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91-1522

Supreme Court
FILED
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No.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1991 TERM

WILLIAM J. HABERSTROH,
District Attorney of Blair County,
Pennsylvania, et. al.,
Petitioner

v.

WAYNE PAUL BURKETT,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Wayne Paul Burkett, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 46.1 of the United States Supreme Court, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Respondent in the United States District Court for

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the Western District of Pennsylvania and on appeal to the United States Court of Appeals for the Third Circuit.

DATED: April 17, 1992

Respectfully submitted,

THOMAS S. WHITE
Federal Public Defender
Counsel of Record

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM J. HABERSTROH,
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v.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

THOMAS S. WHITE
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91-1522

ATTACHED IS A CORRECTED COPY OF THE RESPONDENT'S BRIEF IN

WILLIAM J.HABERSTROH v. WAYNE PAUL BURKETT, 91-1522

CORRECTED PAGES ARE AS FOLLOWS: (i) Questions Presented
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PLEASE REMOVE AND DISCARD THE ORIGINAL 44 PAGES OF THE BRIEF AND INSERT THE ATTACHED CORRECTED COPY.

THIS CASE WAS LISTED FOR MAY 15th, LIST 3, PAGE 15.
AND WAS STRICKEN PENDING RECEIPT OF THE RECORD.

91-1522

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QUESTIONS PRESENTED

I.

DOES THE SIXTH AMENDMENT'S SPEEDY TRIAL CLAUSE APPLY NOT ONLY TO DELAY BEFORE A CRIMINAL TRIAL, WHEN THE DEFENDANT IS PRESUMED INNOCENT, BUT ALSO TO PROCEEDINGS AFTER HE HAS BEEN FOUND GUILTY?

II.

MAY A COURT FIND A CONSTITUTIONAL VIOLATION WHERE THE POST-TRIAL DELAY WAS NEITHER INTENDED TO NOR RESULTED IN PREJUDICE TO THE DEFENDANT'S ABILITY TO PROCEED AT SENTENCING OR ON APPEAL?

III.

MAY A COURT REMEDY ANY SUCH VIOLATION BY DIRECTLY REDUCING THE DEFENDANT'S SENTENCE IN PROPORTION TO THE LENGTH OF THE DELAY?

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> (a) **General Rule.** Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, of the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

STATUTES:

Title 28, United States Code §1254(1).....
Title 28, United States Code §1651(a).....
Title 28, United States Code §2243(a).....
Title 28, United States Code §2254.....
Title 28, United States Code §2255.....

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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OPINIONS AND ORDERS BELOW

The December 20, 1991 opinion of the United States Court of Appeals for the Third Circuit which held that the order of the district court should be reversed and remanded with instructions that the writ of habeas corpus be granted is reported at 951 F.2d 1431 "Burkett III", and is reprinted at P-App. 1-83.[1]

The December 27, 1990 order of the United States District Court for the Western District of Pennsylvania dismissing Burkett's petition for writ of habeas corpus and denying a certificate of probable cause is set forth at P-App. 119-120.

The December 7, 1988 Magistrate's Report and Recommendation is set forth at P-App. 84-97, and the October 18, 1990 Magistrate's Supplemental Report and Recommendation is set forth at P-App.98-118.

The August 7, 1990 unpublished opinion of the United States Court of Appeals for the Third Circuit at Appeal No. 89-3118 which remanded this case to the district court for further proceedings is set forth at R-App. 13a. ("Burkett II").

The July 10, 1987 opinion of the United States Court of Appeals for the Third Circuit which reversed the judgment of the district court with regard to No. 86-3121 and remanded with

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[1] "P-App." refers to the Appendix filed by the Petitioner in conjunction with the current Petition for Writ of Habeas Corpus. "R-App." refers to the Appendix filed by the respondent, Wayne Paul Burkett in conjunction with this Brief in Opposition to Petition for Writ of Certiorari. "App." refers to Appendix filed in Court of Appeals.

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instructions for further proceedings as to the conviction at No. 161, and instructions to grant the writ of habeas corpus and discharge Burkett with regard to the convictions at Nos. 140/141, is reported at 826 F.2d 1208 (3d Cir. 1987)("Burkett I"). This decision is set forth at R-App. 7a.

The May 30, 1985 order of the United States District Court for the Western District of Pennsylvania dismissing Burkett's petition for writ of certiorari and denying a certificate of probable cause "unless the Court of Common Pleas of Blair County fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60) days" is set forth at R-App. 6a.

The May 15, 1985 Magistrate's Report and Recommendation upon which the May 30, 1985 order of the district court is based is set forth at R-App. 5a.

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COUNTERSTATEMENT OF JURISDICTION

The district attorney seeks a writ of certiorari from an opinion of the United States Court of Appeals for the Third Circuit which was filed on December 20, 1991 and is reported at 951 F.2d 1431 (3d Cir. 1991). This opinion held that the district court should be reversed and the case remanded with instructions to grant a writ of habeas corpus by reducing the respondent's sentence by the 39 months of delay chargeable to the Blair County Court.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1) which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a) which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law. Furthermore, 28 U.S.C. §2254 provides that the United States Supreme Court "shall entertain an application for a writ of habeas corpus" where the applicant is in custody pursuant to a state court judgment and where the applicant avers he is in custody in violation of the constitution, laws or treaties of the United States.

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COUNTERSTATEMENT OF THE CASE

While on bail awaiting sentences on two previous criminal convictions in Blair County, Pennsylvania, the respondent Wayne Paul Burkett ("Burkett") was arrested on April 13, 1982 and charged in an Information at No. 284 of 1982 in the Court of Common Pleas of Blair County. The Information charged Burkett with the felonies of burglary and attempted rape; with the misdemeanors of reckless endangering another person, terroristic threats, and simple assault; and with the summary offense of harassment. Burkett has been continuously incarcerated since this arrest, and has steadfastly and consistently asserted his innocence as to all of these charges.

While Burkett was awaiting trial for the charges at No. 284, the prosecution was granted several continuances beginning on October 1, 1982. Burkett filed motions to dismiss for lack of timely prosecution beginning on October 15, 1982. The Blair County Court of Common Pleas denied dismissal and granted further continuances on November 5, 1982 and January 4, 1983, Burkett's jury trial began on January 26, 1983 and Burkett was found guilty on January 28, 1983.

The facts surrounding the crimes are as follows. On Easter Sunday, April 11, 1982, at approximately 11 p.m., Bernice Hummel ("Hummel") was alone in her home in McKee, Pennsylvania. (TT 25; App. 65). She heard a noise at her front door and snapped the front porch light on and saw a young man whom she did not know

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standing between the storm door and the front door. She decided not to let him in and walked away from the door.

The man pushed the door open and entered. (TT 30; App. 70). He asked Hummel if she had called the police, and she responded that she did not call the police. He then sat down and picked up a cigarette and asked for something to drink. She left the room and went into the kitchen and got him a glass of water and then she sat down and asked him to leave. (TT 31; App. 71).

Hummel and the young man conversed for a period of time; and he said that his name was Jim Costlow and that he knew her. He then took her hand and attempted to pull her to the steps leading upstairs. (TT 32; App. 72). He repeatedly said to her that he wanted her to perform sexual acts on him. (TT 32; App. 72). While in the kitchen, the intruder opened a drawer and took out a knife and threatened to slit her throat. Hummel then fainted, and fell to the floor. (TT 33; App. 73).

As Hummel laid on the floor, she heard the young man unzip his pants. (TT 34; App. 74.) She rose and after a struggle, she got away and ran to a neighbor's home.

The police were summoned and responded. (TT 86; App. 126). Hummel provided Officer Peacock of the Pennsylvania State Police with a description of the intruder.

The next day, State Trooper Ligenfelter contacted Hummel for a description in order to prepare a photospread. The officer testified that he received the description of the man as being a "white male, approximately 5'3" to 5'5", dark hair, dark eyes or

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brown hair and brown eyes and that he had not shaven for a while. (TT 104; App. 144). Hummel did not described the man as having a mustache or a beard. (TT. 106; App. 146).

A photospread was displayed to Hummel. (See Commonwealth's Exhibit 11, App. 1190-1191 which depicts Burkett at number five with a mustache and very light whiskers.) Hummel picked a picture of Burkett from the photospread prepared by the Pennsylvania State Police (Commonwealth's Exhibit 11, App. 1190-1191).

Burkett was arrested two days after the attack on Hummel on April 13, 1982 for the offense of burglary, criminal attempt (rape), terroristic threats, simple assault, recklessly endangering another person and harassment. Although Burkett did not have a beard in the photo in the photospread shown to Hummel at the time of his arrest, Burkett was photographed by the Pennsylvania State Police (entered into evidence as Commonwealth's Exhibits 14 and 15; App. 1192-1193). In these photographs, Burkett has a fully-grown beard.

Prior to the commencement of the preliminary hearing held on April 22, 1982, in Burkett's presence and before his counsel had arrived, the arresting officer pointed to Burkett, who stood in handcuffs, and asked Hummel: "Is this the guy that broke into your home and attacked you?" Hummel hesitated and then responded "Yes." Approximately five minutes later, counsel for Burkett arrived accompanied by the state magistrate and counsel's secretary. (Habeas Corpus Petition, Statement of Facts, pages 9-10; App. 482-483). At the preliminary hearing Hummel identified

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Burkett in a one-on-one show-up, and Burkett's counsel never moved to suppress the identification.

At trial it was learned during cross-examination that Hummel, on the morning of the trial, had been shown two color photographs of Burkett which were taken after his arrest (Commonwealth's Exhibits 14 and 15; App. 1192-1193). These photographs show Burkett with a full beard, a feature never reported by Hummel in describing her assailant. (Habeas Corpus Petition, Statement of Facts, pages 10-13; App. 483-486). Despite this impermissible and suggestive photographic display, Burkett's counsel never moved to have the in-court identification suppressed.

At trial, Officer Peacock testified that the complete description he received of the actor from Hummel was a white male, between twenty and twenty-five years of age, 5'2" to 5'5" and approximately 115 to 120 pounds, wearing a dark jacket or vest and jeans. (TT 96; App. 136).

Defense counsel on cross-examination questioned the officer as to whether or not there was a description of a beard. According to the officer, Hummel was upset when he asked her and said that she really wasn't sure; although she did not see a beard, she thought there was facial hair. (TT 100; App. 140).

Hummel identified Burkett at trial as the assailant, but identified that he had a "blue" beard at the time of the attack. Aside from Hummel's identification, there was no other evidence that linked Burkett to the crime.

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At trial, Burkett testified on his own behalf and denied committing the crimes. Burkett called his mother, his sister Sonya, and his sister's boyfriend, Mark Yanke, to testify on his behalf. All of these witnesses fully corroborated his alibi.

Counsel for Burkett did not move before trial for a hearing to determine whether the suggestive one-on-one confrontation between Hummel and Burkett at the Magistrate's hearing held April 22, 1982 so tainted her identification so as to make her identification unreliable and inadmissible. Trial counsel was made aware specifically that Hummel had seen Burkett in handcuffs at this hearing and of the suggestive identification procedures used by the police before counsel arrived, but did nothing to safeguard Burkett's rights to due process, and did not request a hearing to suppress identification or photo spreads.

Burkett exhausted his state court remedies regarding this issue of identification before the Pennsylvania Supreme Court, but neither the district court nor the court of appeals granted Burkett any relief. (See Court of Appeal's opinion, App. 68-73).

Burkett has steadfastly and consistently asserted his innocence regarding the crimes at No. 284 of Blair County.

On January 28, 1983, Burkett was convicted of all felony and misdemeanor counts by a jury and, on January 31, 1983, the trial court found him guilty of the charged summary offense. Burkett filed timely post-verdict motions. Under Pennsylvania practice,

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post-trial motions must be disposed of before a defendant is sentenced.[2]

After writing many letters to the trial judge, Judge Peoples, the court administrator, and his attorney, Burkett filed a petition for writ of habeas corpus with the Blair County Court of Common Pleas on March 12, 1984. Burkett challenged his custody in all three of his cases on the basis of speedy trial and due process violations, because he had still not been sentenced. A hearing on this petition was held on October 1984 and at the conclusion of the hearing, Judge Brumbaugh announced that he would render a decision in one week on Burkett's request for bail or on the question of habeas corpus relief. When no order was issued on his habeas corpus petition after two months, Burkett filed for relief in the Pennsylvania Superior Court on December 12, 1984. Relief was ultimately denied by the Superior Court on August 28, 1985 and by the Pennsylvania Supreme Court on April 24, 1986.

Meanwhile, Burkett had also sought to raise the issue of his counsel's ineffectiveness at No. 284 in order to preserve that issue for appeal. On September 6, 1984, Burkett filed a motion concerning his counsel's ineffectiveness. On January 23, 1985, Burkett objected at the hearing on his post-verdict motions at No. 284 that his motion concerning ineffectiveness in that action had

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[2] Although the district attorney states on page 8 of his petition that the delay was caused by overcrowded court dockets, the Court of Appeals did not so find. (P-App. 31-33, 38). The court administrator testified that the Blair County Courts voluntarily closed during the months of July and August; and when the court was open, one week per month per judge was reserved for opinion writing time. (P-App. 56).

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not yet been resolved, and Judge Peoples granted his motion to continue that hearing until the issue of his trial counsel was resolved.

On March 28, 1985, Burkett filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania at Civil Action 85-0769 charging that the delay in sentencing in all of his cases violated his rights under the Speedy Trial Clause.[3]

A Magistrate Judge was assigned this habeas corpus matter and after requiring the district attorney to file an answer, filed a Report and Recommendation on May 15, 1985, finding exhaustion excused because of inordinate delay in sentencing Burkett. The Magistrate Judge also found lengthy delay and that Burkett had asserted his speedy trial rights and attributed no delay to Burkett. The Magistrate Judge also found prejudice in that the delay had "caused some loss to the petitioner." The Magistrate Judge recommended to the district court that it would be appropriate to schedule a hearing on Burkett's post-trial motions at No. 284 for the earliest possible date available in the Blair County Court of Common Pleas.

The Magistrate Judge, therefore, recommended to the district court that as to all of Burkett's cases that the writ be denied, "unless the Court of Common Pleas fails to dispose of the post-trial motions and impose any appropriate sentence within sixty

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[3] The Court of Appeals for the Third Circuit construed this petition to allege a due process violation as well. See Burkett I, at 1212.

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(60) days." The district court granted the parties ten days for the filing of objections to the report, but no objections were filed. The district court adopted the Magistrate Judge's Report and Recommendation as its opinion on May 30, 1985.

The Blair County Court did not appeal, but Burkett did. On August 14, 1985, the court of appeals denied Burkett a certificate of probable cause, without prejudice to filing a new petition in the district court.

The Blair County Court of Common Pleas denied Burkett's state habeas corpus petition on June 6, 1985.

After denying his motion for new counsel at No. 284 on April 2, 1985, the court proceeded to deny his post-trial motions on May 8, 1985, some 29 months after these motions were filed, and to sentence Burkett on June 24, 1985. Burkett received consecutive sentences totaling 16 to 32 years, which according to the court was the maximum permitted under law. But Burkett was still not sentenced on his other two cases.

Burkett then filed two habeas corpus petitions on August 27, 1985 in the United States District Court for the Western District of Pennsylvania at Civil Action No. 85-1966, referred to hereinafter as No. 86-3074, the docket number in the court of appeals. Burkett sought relief for delay at No. 284 and also claimed that the federal court's order giving the Blair County Court sixty days to sentence him had exposed him to a severe retaliatory sentence. At Civil Action No. 85-1965, No. 86-3121 in the court of appeals, Burkett asserted similar claims concerning

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his other two convictions at No. 140/141 of 1981 and No. 161 of 1981.

After the district attorney filed an answer, an evidentiary hearing was eventually held on December 23, 1985. Following that hearing on December 24, 1985, the Magistrate Judge recommended dismissal for want of exhaustion as to the case at No. 284 in Blair County. After timely objections by Burkett, the district court adopted the Magistrate Judge's Report as its opinion on January 15, 1986. Burkett filed a timely appeal.

With regard to his other two cases, the Magistrate Judge did not hold an evidentiary hearing, but recommended dismissal for want of exhaustion on the basis that the cases were being processed for disposition by the Blair County Court and that Burkett could proceed to the Pennsylvania Superior Court where the merits of the petition, including the issue of delay, could be addressed. (App. 56).

On appeal by Burkett, the court of appeals in a published opinion, Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987) ("Burkett I") agreed with Burkett's legal position and the district court, and held that the Speedy Trial Clause of the Sixth Amendment applies from the time an accused is arrested up through the sentencing phase of prosecution. See Burkett I at 1220.

The court of appeals, quoting Evitts v. Lucey, 469 U.S. 387 (1985), also held that the Due Process Clause requires that a right to appeal is the right to an adequate and effective appeal quoting this Court:

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> The Due Process Clause thus protects not only against delays in trial, including a sentencing; it also guarantees a reasonably speedy appeal if the state has chosen to give defendants the right to "attempt [] to demonstrate that the conviction and the consequence drastic loss of liberty is unlawful."

Burkett I, 826 F.2d at 1221, quoting Evitts, 469 U.S. at 396.

The court of appeals described the delay in Blair County "as ranging from excessive to monumental," and observed that the problem of delay in Blair County "seems endemic." Burkett I at 1210.

On the merits, at Appeal No. 86-3121, the appeal that covered Burkett's convictions at No. 140/141 of 1981, the court of appeals noted that Burkett had been incarcerated well over six years without a sentence, and that the Blair County Court had ignored a federal court order to sentence Burkett. On this case, the court of appeals remanded to the district court and ordered that the district court issue the writ of habeas corpus forthwith and discharge Burkett on those convictions. The district attorney did not petition for a rehearing in the court of appeals or petition this Court for certiorari respecting this ruling.

At No. 161 of 1981 of Blair County, Court of Appeal No. 86-3121, the court of appeals held that because of the Blair County trial court's delay in filing of an opinion, which was a precondition to Burkett's right to proceed with his appeal, Burkett's due process rights to a timely appeal may have been violated. It remanded that case to the district court to make

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factual findings as to whether Burkett had suffered any prejudice because of the delay in processing his appeal. On remand the district court, after a hearing, found that Burkett had suffered prejudice and granted the writ as to No. 161 of 1981 ordering that Burkett be discharged forthwith. (P-App. 13-14). The district attorney did not appeal the district court's order granting the writ.

With regard to No. 284 of 1982 of Blair County, the court of appeals held that because Burkett's direct appeal in the Pennsylvania appellate courts "appeared to be proceeding normally," it would affirm the district court's dismissal of that case for lack of exhaustion.

After the Supreme Court of Pennsylvania denied allocatur on Burkett's appeal on his case at No. 284 of 1982, on December 28, 1987, Burkett filed a petition for habeas corpus at Civil Action No. 88-1397 in the Western District of Pennsylvania. The district court dismissed Burkett's petition without an evidentiary hearing and Burkett appealed because it viewed Burkett's filing as alleging only ineffectiveness of counsel, and denied Burkett's leave to amend his petition to aver violations of Speedy Trial Clause and Due Process. On his appeal in the court of appeals at 89-3118, Burkett relied on the court of appeals opinion in Burkett I, 826 F.2d 1208 (3d Cir. 1987), for the proposition that his speedy trial and due process rights had been violated. The district attorney in its brief in the court of appeals did not seek to challenge the principles announced in Burkett I.

The court of appeals, in Burkett II an unpublished opinion, at No. 89-3118, dated August 7, 1990, R-App. 13a, at Court Appeals No. 89-3118, August 7, 1990, reversed the district court's dismissal of Burkett's petition holding that the district court had erred in not allowing Burkett to amend his petition to allege speedy trial and due process claims. The district court was ordered on remand by the court of appeals to follow the analysis of Barker v. Wingo, 407 U.S. 514 (1972).

On remand to the district court, the Blair County district attorney filed a brief. (R-App. 14a). His brief did not raise the issue of whether the Speedy Trial Clause applies between conviction and sentence. The district attorney merely averred that the delay was caused by the motions Burkett filed asserting his speedy trial rights and also by Burkett's attempts to have counsel appointed. In addition, the district attorney averred that Burkett had not suffered any prejudice.

At no time during the hearing did the district attorney ever raise the issue of whether the Speedy Trial Clause applies to the time between the finding of guilt and sentencing. After the evidentiary hearing, the district court ruled that Burkett had been responsible, in part, for the delay by virtue of his motions filed in the Blair County Court, and therefore any prejudice that he experienced could not support the granting of relief.

Burkett appealed to the court of appeals. In his brief, Burkett relied heavily on Burkett I. Burkett stated quite clearly the issue regarding the delay in his appellate brief:

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> Burkett's rights under the Fifth, Sixth and Fourteenth Amendment to the Constitution were violated by the Commonwealth's inordinate delay in disposing of Burkett's post-trial motions, in imposing sentence, and in processing Burkett's appeal.

The district attorney in its brief in the court of appeals which is set forth in its entirety as an appendix to this response (R-App. 14a) did not challenge in any way the ruling that the Speedy Trial Clause applied to delay in post-trial proceedings. In fact, the district attorney specifically acknowledged the applicability of Barker v. Wingo, supra, stating at page 16 of its brief as follows:

> The BARKER V. WINGO, Supra. analysis has been translated to the area of post trial motions and sentencing thereto. BURKETT V. CUNNINGHAM, 826 F.2d 1288 [sic], (3d Cir. 1987) citing RHEUARK V. SHAW, 628 F.2d 297 (5th Cir. 1980), cert. den. 450 U.S. 931, 67 L.ed.2d. 365, 101 S.Ct. 1392 (1981). The factors to be considered are 1) prevention of oppressive incarceration pending appeal; 2) minimization of anxiety over concern of those convicted awaiting the outcome of their appeals; 3) limitation of the possibility that convicted persons' grounds for appeal and his or her defenses in case of reversal on a retrial might be impaired.

The district attorney in its brief argued only that the incarceration that Burkett suffered was his own doing and therefore prejudice cannot "be found here;" and that minimization of anxiety and concern cannot be found where Burkett had his bail withdrawn so that he could claim credit for time-served when he was sentenced. While the district attorney never challenged the clearly enunciated ruling by the court of appeals that the Sixth

Amendment applies from the date of the finding of guilt to the sentence, he attempts to do so here.

In its oral argument in the court of appeals, the district attorney again did not challenge the principle that the Speedy Trial Clause applies from the time of the finding of guilt.

In the opinion the court of appeals filed in this case, Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991)("Burkett III")(P-App. 1-83), the court of appeals began its opinion by again noting the saturated dockets and apparent strain on judicial resources in Blair County give rise to an examination of whether the state prisoner's constitutional right to a speedy trial and due process of law have been violated by delays in post-conviction proceedings. In footnote one, the court of appeals notes four previous cases in the United States courts based on the delay in Blair County in disposing of criminal cases.

The court of appeals held that Burkett's constitutional rights to a speedy trial and to due process of law were violated by delays in post-conviction proceedings. See page three of Burkett III. The court of appeals applied the Barker v. Wingo analysis to Burkett's case and found that 38 1/2 months have passed from arrest to sentencing, and, that 29 of those months dated from the guilty verdict.

The court of appeals noted that while Burkett's aggressive petitioning of the Courts required additional paperwork, scheduling of hearings and courtroom times, such actions were "not unreasonable," in light of the fact that Burkett's state habeas

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corpus petition was not scheduled for hearing for almost seven months after its filing. The court of appeals pointed out that Burkett's state habeas corpus filing, rather than demonstrating that Burkett contributed to the delay, instead, indicated that the Blair County Court had a "general inability" to process its criminal dockets in a timely fashion. The court of appeals also found, as did the district court, that Burkett's assertion of his rights heavily weighs this factor in his favor.

The court of appeals found prejudice from the fact that Burkett was unable to avail himself of institutional programs, critical to his rehabilitation, available through the state but not the county penal system, and the fact that Burkett lost visitation privileges that he could have obtained in the state system as opposed to the county system, along with uncontradicted evidence of anxiety and emotional distress; as a result, the court of appeals found that relief was appropriate under **Barker** and its progeny.

The court of appeals then analyzed Burkett's claims under the Due Process Clause to determine whether a violation occurred because of appellate delay. Here again, the court of appeals found that the length and cause of the delay weighed against the government and in favor of Burkett. Moreover, Burkett's assertion of his rights strongly tipped the scale in Burkett's favor. (P-App. 60). As to the prejudice factor, the court of appeals found that although Burkett's evidence was less than overwhelming, it was satisfied that Burkett demonstrated a genuine loss, cumulative in

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nature because of the delays in the post-conviction processing of his case both at the trial court level and through the appellate process.

Finally, the court of appeals found that it could fashion alternative relief to the relief that Burkett sought, which was discharge from incarceration. The court of appeals relying on Title 28 U.S.C. §2243(a) and Strunk v. United States, 412 U.S. 434 (1973) and Hilton v. Braunskill, 481 U.S. 770 (1987), held that it had the authority to fashion an appropriate remedy for the prejudice suffered by Burkett. Therefore, the court of appeals ordered that the case be remanded to the district court with instructions to grant the writ, imposing the remedy it fashioned to alleviate the specific prejudice suffered. The court of appeals ordered that the Burkett sentence be reduced by 39 months.

The district attorney did not file a petition for rehearing or rehearing en banc. After waiting 48 days, after the date of the decision, he applied for a recall of the mandate to allow the district attorney to file a petition with this Court. The court of appeals granted the district attorney's motion to recall the mandate.

Burkett is incarcerated serving his sentence at No. 284 of 1982 of Blair County in the State Correctional Institution at Huntingdon, Pennsylvania.

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SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

Burkett asserts that the court of appeals for the Third Circuit fully considered the issues raised by the parties and correctly decided those issues including the proper relief to be granted to Burkett.

In neither the district court nor the court of appeals did the district attorney question the rulings made by the lower courts that the petitioner seeks to have this Court review.

Therefore, it is Burkett's submission that the petitioner has waived his rights to challenge that ruling here. See **Springfield v. Kibbe**, 480 U.S. 257, 259 (1987); **California v. Taylor**, 353 U.S. 553, 556 fn.2 (1957).

Significantly, although the petitioner argues that this Court should accept this case for review, he does not set forth in his petition where he raised the question in the courts below that he seeks to raise here. The reason for this omission is because he never objected to the Speedy Trial Clause being applied to Burkett's case either in the district court or the court of appeals, but merely argued that Burkett had caused the delay and had not been prejudiced by the delay.

Although this case arises out of a matrix of the three cases between the same parties and the district attorney of Blair County was the answering respondent in all three cases he did not object even in the first case where the court of appeals announced that

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it was adopting the position set forth by Burkett in the district court that the Speedy Trial Clause applies to the period from the date of adjudication of guilt to the time of sentencing. See Burkett I. Even though the respondent had ample opportunity through three separate habeas corpus actions involving Burkett, where Burkett claimed that his rights under the Speedy Trial Clause and due process were violated because of the delay in imposition of sentence, the district attorney did not challenge that proposition either in the district court or the court of appeals.

Therefore, it is Burkett's submission that the petitioner has waived his right to present this issue here.

II.

Burkett also submits that the decision by the court of appeals arose from a particularly unique factual matrix that required the court of appeals to deal with the endemic problem of delay in the Blair County Court and that because that problem is now unlikely to recur, there is no reason for this Court to exercise its discretion to review this case. As recited by the court of appeals in its decision, (P-App. 2-3, fn.1) many federal habeas corpus petitioners had challenged in constitutional terms the delay caused by the Blair County Courts in the processing of their cases. Therefore, the court of appeals was dealing with problem where the constitutional rights of incarcerated citizens

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were being violated due to the indifference of the Blair County Courts and the Commonwealth of Pennsylvania.

Moreover, Burkett avers that the decision of the court of appeals rests on both Speedy Trial Clause grounds and Due Process grounds and was designed to correct the unconscionable and unconstitutional delay occurring in the Blair County Courts, that the Commonwealth of Pennsylvania was not redressing. Hence, it is Burkett's position that even if this Court were to address the Speedy Trial Clause aspect of the case, on remand, the court of appeals might well find that Burkett's rights under the Due Process Clause were violated to such an extent that the remedy would remain the same. The district attorney has never challenged the case on the ground that the Due Process Clause did not protect the time between adjudication of guilt and sentence. See **Evitts v. Lucey**, 469 U.S. 387 (1985). This Court may of course sustain a judgment of the court of appeals on any ground on which it finds support in the record. Hence, because the court of appeals' decision rests on alternative grounds, a decision by this Court in this case may have no effect on the outcome.

III.

There is no substantial division of authority on the question that the petitioner seeks to have this Court review. Although the petitioner acknowledges that all the federal cases that have been presented with this issue have determined that the Speedy Trial

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Clause does apply to the delay between adjudication and sentencing and that there are only a few state cases that substantially disagree with the holding of the Third Circuit that the Speedy Trial Clause does apply to the delay between adjudication and sentencing, he would have this Court grant review of this case to clear up confusion in the state and federal courts: confusion that Burkett submits does not exist. See Infra, p. 29. Therefore, because there is no substantial division of authority on the question presented there is no need for review of the questions presented for this Court at this time.

IV.

The collateral issues of the prejudice suffered by Burkett and the proper remedy to correct that prejudice were fully considered and correctly decided by the court of appeals.

Under **Moore v. Arizona**, 414 U.S. 25 (1973), the prejudice suffered by virtue of the delay need not be to the petitioner's rights at retrial but may be personal to him. Such was the case here. The court of appeals, based on the uncontested facts in the record, found that Burkett did suffer from the delay because the delay caused him great anxiety, and emotional distress as manifested by the change in his behavior and his crying outbursts and the delay prevented him from participating in beneficial rehabilitative programs that he could not obtain while in the county jail and which were available to him in the state prison

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system, post sentencing.

The remedy crafted by the court of appeals went no further than necessary to correct the constitutional violation and the court of appeals authority to fashion this remedy is support by both the habeas corpus statute 28 U.S.C.A. §2241(a) and §2243, Strunk v. United States, 412 U.S. 434 (1973). Therefore it is Burkett's position that this Court should deny the petition for writ of certiorari.

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE PETITIONER HAS WAIVED HIS RIGHT TO CHALLENGE THE ISSUE THAT HE SEEKS TO HAVE THIS COURT REVIEW.

It is clear that the respondent District Attorney of Blair County (hereinafter referred to as the "district attorney") never raised in either the district court or the court of appeals the question which he now seeks to have this Court review: Whether the Speedy Trial Clause applies from the time of the finding of guilt to the time of sentencing.

In Burkett I, the district attorney did not challenge the proposition that Burkett clearly set forth in his brief: that the Speedy Trial Clause applies to the time from the date of the finding of guilt to the date of sentence. (See district attorney's brief filed in Burkett III in response to Burkett's brief in the United States Court of Appeals. (R-App. 14a)). As a result, the court of appeals clearly announced in Burkett I that it was remanding Burkett's case at No. 140-141 for the district court to order Burkett's discharge because he had not been sentenced in over six years and therefore his speedy trial rights were violated. Burkett I at page 1224-1225. The district attorney had not objected to the Magistrate Judge's report in the district court, as noted by the court of appeals in Burkett I at page 1223. Therefore, the court of appeals merely affirmed the district court's order which conditionally granted the writ and

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made it unconditional because Blair County had not acted after being ordered to do so by the district court.

On the remand at No. 161 after Burkett I, the district attorney again had an opportunity to raise the issue it seeks to raise here, but did not do so. In that case, after findings by the district court, Burkett was ordered discharged due to violations of Burkett's due process rights because he had not been sentenced promptly. (See P-App. 13-14). The district attorney did not appeal that order to the court of appeals.

Finally at No. 284 of Blair County, after Burkett had exhausted his state remedies in accordance with the order of the court of appeals in Burkett I, Burkett filed his second petition at Civil Action No. 88-1397. There the district attorney never disputed that the Speedy Trial Clause did not apply to the delay between the time of the adjudication of guilt and his sentencing. (See Petitioner's Answer in district court, R-App 9a, 11a)

In the court of appeals following the denial of his habeas corpus rights, the district attorney did not raise the issue that the Speedy Trial Clause or the Barker v. Wingo analysis did not apply to determine if Burkett's rights were violated. After Burkett's appeal in that case, the court of appeals in an unpublished opinion held that the district court had erred in not allowing Burkett to amend his petition to aver speedy trial and due process violations and remanded to the district court with directions that the analysis of the Barker v. Wingo to be applied to determine if Burkett's speedy trial rights had been violated.

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In the district court, the district attorney filed a brief, (R-App. 12a). In its brief in the district court, the district attorney did not raise the issue of whether the Speedy Trial Clause applies at the time between the adjudication of guilt and the time of sentence.

The Magistrate followed the Barker v. Wingo analysis and determined that Burkett's rights had not been violated. The district attorney did not file any objections to the Magistrate's Report arguing the issue that the Sixth Amendment Speedy Trial Clause did not apply.

Finally, on appeal, in answer to Burkett's brief, the district attorney did not even hint that it wished to litigate the question of whether the Sixth Amendment Speedy Trial Clause applied to the time between the adjudication of guilt and the time of sentence. (R-App. 14a). Following the court of appeals decision in this case, the district attorney did not file a petition for rehearing or a petition for rehearing en banc challenging the Court's analysis based on the premise that the Sixth Amendment Speedy Trial Clause applies to the time between the adjudication of guilt and sentencing.

To demonstrate clearly that this issue is not raised in the district court or the court of appeals, this Court need only examine the majority and the dissenting opinion in Burkett III, where both accept Burkett I as settled law, and note that there is no challenge thereto.

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Under this Court's long-standing precedents it will ordinarily not consider questions that have not been raised or litigated in the lower courts. **Springfield v. Kibbe**, 480 U.S. 257, 259 (1987); **California v. Taylor**, 353 U.S. 553, 556, fn. 2, (1957). Like the respondent in **Springfield**, **supra**, Burkett strenuously objects to the petitioner's raising this question at the first point that Burkett was put on notice that it was an issue in the case. See **Springfield**, at 260. Accordingly, as the district attorney raised the question he seeks to have this Court review for the first time in this Court, this Court should follow its well-settled precedents under the doctrine of waiver to deny the petition for certiorari.

II.

THIS COURT SHOULD DENY THE PETITION BECAUSE THE DECISION OF THE COURT OF APPEALS ADDRESSED AN UNUSUAL SET OF FACTS, WHICH IS UNLIKELY TO RECUR.

The court of appeals has recited in its opinion that it was faced with a recurring problem regarding the denial of prisoner's speedy trial rights and due process rights in the adjudication of their criminal cases. As noted by the court of appeals, this is just one case out of three where Burkett's rights have been found to have been violated and Burkett was only one of several habeas corpus petitioner's who had brought the problem to the federal courts that arose through Blair County's total indifference to the rights of criminal defendants to have their claims disposed of within a reasonable time. (P-App. 2-3).

Furthermore, the decision of the court of appeals in granting relief did not rest solely on the Speedy Trial Clause of the Sixth Amendment, but also on the Due Process Clause of the Fourteenth Amendment.

Hence even assuming arguendo that this Court were to find that the Sixth Amendment Clause did not apply to the delay between the finding of guilt and the sentence, the court of appeal's decision would not necessarily be reversed because it could be upheld on the ground that Burkett's rights under the Due Process Clause were violated, and this would lead to the same result and remedy. See **Evitts v. Lucey**, 469 U.S. 387 (1985), This Court, of course, may uphold the court of appeals' decision on any ground

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that supports the judgment of the lower court. Brown v. Allen, 344 U.S. 443, 459 (1953). Therefore, the issue that the petitioner here attempts to raise for this Court's review was not the sole basis for the court of appeals' decision. Instead, that decision rests on alternative due process grounds. Hence, for these reasons, the petition should be denied.

III.

THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NOT SUBSTANTIAL DISAGREEMENT CONCERNING THE QUESTION PRESENTED IN EITHER THE FEDERAL OR STATE COURTS.

A.

FEDERAL COURTS

In Pollard v. United States, 352 U.S. 354 (1957), the petitioner filed a federal habeas corpus action pursuant to 28 U.S.C. §2255 arguing that he had been illegally sentenced because the district court had imposed sentence after he was removed from the courtroom for two years. A judgment order had been entered on the record sentencing him to probation. Two years later, upon the district court finding that Pollard violated his probation, it vacated its earlier order of sentence and sentenced the petitioner to two-years imprisonment.

The petitioner argued, inter alia, that his Sixth Amendment right to a speedy trial was violated because of the delay in sentencing him. This Court stated at 361:

> We will assume arguendo that sentence is part of the trial for purposes of the Sixth Amendment."

This Court then held that whether delay in completing a prosecution violates constitutional rights depends on the circumstances. In Pollard, the court found that the delay was not

purposeful or oppressive but was accidental and promptly corrected when discovered. The court therefore denied Pollard relief.[4]

In applying the Pollard dictum, the courts of appeals have uniformly and consistently held that the speedy trial provisions of the Sixth Amendment include sentencing delays.

As recently as 1986, the Court of Appeals for the Tenth Circuit noted that "no federal court has held that sentencing is not within the protective ambit of the Sixth Amendment right to a speedy trial." Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986). (emphasis added). One year later, in Burkett I, the Third Circuit, citing Perez, confirmed that all of the federal courts which have addressed this issue have followed Pollard and held that sentencing delays are covered by the Sixth Amendment's Speedy Trial Clause. Burkett, 826 F.2d at 1220. Research has confirmed that in the case law before, as well as after, Perez and Burkett I, no circuit has held that sentencing delays are excluded from coverage under the Sixth Amendment.[5]

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[4] Burkett's case is clearly distinguishable from Pollard because Burkett did call attention to the error being made by the Blair County in not disposing of his post-trial motions, in not sentencing him and in not filing an opinion which thwarted his appellate rights.

[5] See Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987); Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986); Tinghitella v. California, 718 F.2d 308, 312-13 (9th Cir. 1983); Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981); Katz v. King, 627 F.2d 568, 576 (1st Cir. 1980); United States v. Merrival, 600 F.2d 717,720 (8th Cir. 1979); United States v. Campisi, 583 F.2d 692, 694 (3d Cir. 1978); United States v.Howard, 577 F.2d 269, 270 (5th Cir. 1978); United States v. Reese, 568 F.2d 1246, 1253 (6th Cir. 1977); United States v. Campbell, 531 F.2d 1333, 1335 (5th Cir. 1976), cert. den'd 434 U.S. 851 (1977); Juarez-Casares v. United States, 496 F.2d 190, 192 (5th Cir. 1974); Brady v. Superintendent

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One of the cases which has adopted Pollard provides insight into why the Sixth Amendment should be interpreted so as to include sentencing delays:

> It would be a strained construction of the speedy trial clause to hold that it protected the right to a prompt trial but permitted indefinite postponement of sentencing of a defendant unable to make bail.

Cobb v. Aytch, 643 F.2d 946, 962 (3d Cir. 1981).

Anne Arunder County Detention Center, 443 F.2d 1307 (4th Cir. 1971); United States v. Sherwood, 435 F.2d 867 (10th Cir. 1970).

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B.

STATE COURTS

The district attorney states in its petition that many state courts, "like the federal courts, simply perpetuated the Pollard assumption without further analysis". (emphasis added). The petition then cites cases which the district attorney claims support this statement.

Contrary to the district attorney's brief several of the cases cited go to great lengths to discuss the underpinnings of the right to a speedy sentencing under the Sixth Amendment right to a speedy trial. Many of the remaining state cases cite either federal cases or reasoned state opinions as the basis for finding the existence of the constitutional right.

The state cases which have dealt with the issue of whether sentencing is a part of the Sixth Amendment Right to a Speedy Trial can be placed into three categories. In the first category are those states which have adopted either the Pollard assumption[6] or develop a reasoned opinion or follow one of the

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Pa. - Commonwealth v. Pounds, 490 Pa. 621, 417 A.2d 597 (1980). (also found that the Due Process Clause was implicated).
Del.- Johnson v. State, 305 A.2d 622 (Del.Sup.1973) cert. dismissed 413 U.S. 901 (1973).
Ala.- Noe v. State, 391 So.2d 151 (Ala.App.1980).
N.C.- State v. Avery, 95 N.C.App. 572, 383 S.E.2d 224 (1989) (does not apply to resentencing).
Miss.- Yates v. State, 342 So.2d 312 (Miss.1977).
Mass.- Commonwealth v. Bianco, 390 Mass. 254, 454 N.E.2d 901 (1983) (Case presented mixed question with Mass. state law. Due Process Clause also implicated at sentencing.)

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reasoned state or federal cases which have found such a right[7]. This view is held by fourteen state appellate courts.

The second view is that the Sixth Amendment does not encompass a right to a speedy sentencing. This view is held by only four state courts[8] and one court assumes without discussion that a right to speedy sentencing does not exist[9]. Most of these courts, however, apply the Fourteenth Amendment and due process rights to sentencing.

Mo. - State v. Haslip, 583 S.W.2d 225 (Mo.App.1979).
Wash.- State v. Braithwaite, 34 Wash.App. 715, 667 P.2d 82 (1983). (Another division of the Wash.App. court held that there is no right to a speedy sentencing in State v. Lammert, 540 P.2d 466 (Wash.App.1975)).
Miss. - Yates v. State, 342 So.2d 312 (Miss.1977).
Mich. - People v. McIntosh, 103 Mich.App. 11, 302 N.W.2d 321 (1981)

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Alaska Gonzales v. State, 582 P.2d 630 (Alaska 1978).
Vermont State v. Dean, 536 A.2d 909 (Vt.1987).
California People v. Domenzain, 161 Cal.App.3d 619, 207 Cal.Rptr. 724 (4 Dist. 1984).
Utah State v. Banks, 36 Utah.Adv.Rep.7, 720 P.2d 1380 (1986) (Speedy trial rights encompass the time during which the matter is under consideration by trial court.)

8

Iowa - State v. Drake, 259 N.W.2d 862 (Iowa 1977), ovrld by State v. Kaster, 469 N.W.2d 671 (Iowa 1991). (Court finds a Due Process right to speedy sentencing but this issue was not raised by the petitioner in this case).
La. - State v. Johnson, 363 So.2d 458 (La.1978).
Kan. - State v. Freeman, 236 Kan. 274, 689 P.2d 885 (1984).
Va. - Walker v. Commonwealth, 4 Va.App.286, 356 S.E.2d 853 (1987).

9 Texas - Ramos v. State, 486 S.W.2d 297 (Tex.Crim.1972). (The only reference to any right is that "there has been no delay to a person presumed innocent in the present case because appellant had already been convicted.")

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States that have adopted the third view have not ruled on whether the Sixth Amendment right to a speedy trial includes the sentencing phase. This view has been taken by eight states. These states have either looked to the Due Process Clause of the Fourteenth Amendment to decide the case at hand[10] or have looked to state law or constitutions;[11] or state that the trial court had lost jurisdiction because of the delay;[12] or have refused to decide the issue[13].

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W.Va.- Ball v. Whyte 294 S.E.2d 270 (W.Va.1982).
Fla. - Lee v. State, (Fla.App.1st Dist.1986).
Wyo. - Despain v. State, 774 P.2d 77 (Wyo.1989). (This opinion does a nice display of the state of the law in 1989. The court then refuses to adopt a position in the case before it. The court does recognize a Due Process Right to a speedy sentence and states that this right is embodied in state statutes.
Md. - Erbe v. State, 276 Md. 541, 350 A.2d 640 (1976) (Case decided on the Maryland Constitution Article 21 and the Due Process Clause of the Fourteenth Amendment.)

11

Oregon - State v. Custer, 240 Or. 350, 401 P.2d 402 (1965) (State habitual criminal proceedings are not part of an original criminal trial for the principal offense and thus is not covered by any speedy trial right.)

12

People v. Harper, 520 N.Y.S.2d 892, 137 Misc.2d 357 (1987). (Court discusses and holds that speedy trial right encompasses pre and post trial motions. Court finds that there can be an independent violation of the New York Constitution. Court finds that the prosecution was abandoned and therefore the trial court lost jurisdiction to sentence the defendant).

13

Arizona - State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980) cert. denied 449 U.S. 913 (1980). (After discussing the Sixth Amendment, the court refused to take a position.)
N.J. - State v. LeFurge, 222 N.J.Super. 92, 535 A.2d 1015 (N.J.1988) (Court states that where a person is not subject

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The primary state case in the first view is Gonzales v. State, 582 P.2d 630 (Alaska 1978). The district attorney incorrectly cites this as one of the cases which adopts the Pollard reasoning. The Gonzales court, after reciting seven policy considerations for a speedy trial[14], determined that five of the reasons applied directly to sentencing. Even though the list of reasons discussed are not exhaustive, the court concluded that a constitutional right exists to a speedy sentencing.

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to liberty restraints the Sixth Amendment right to a speedy trial in not affected. citing U.S. v. Loud Hawk, 474 U.S. 302 (1986).

[14] This Court discussed the interests presented in Dickey v. Florida, 398 U.S. 30, 39 (1970) (Brennan and Marshall, JJ., concurring), a case which preceded Barker v. Wingo. It summarized the points as follows:

1. Spare the accused those penalties and disabilities incompatible with the presumption of innocence which may spring from delay in the criminal process;

2. Prevent undue and oppressive incarceration prior to trial;

3. Minimize anxiety and concern accompanying public accusation which might chill the accused's free speech or association with the unpopular causes;

4. Impair the accused's ability to present a defense due to death or unavailability of witnesses or dulled memories, etc.;

5. Minimize the possibility that the accused, while on bail pending trial or appeal may commit another dangerous crime;

6. Minimize delays which might adversely affect the government's ability to prosecute the case;

7. Penalize official abuse or lawlessness and encourage the fair and expeditious administration of justice.

The Gonzales court found all but the first and sixth considerations to be implicated at the sentencing phase.

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Many of the cases cited by the district attorney as not discussing the constitutional background of a right to a speedy sentencing under the Sixth Amendment cite the reasoning established in Gonzales. The case of State of New Hampshire ex. rel. McLellan, 127 N.H. 33, 498 A.2d 735 (1985) (Souter J.) after discussing the policy reasons for speedy sentencing finds such a guarantee to exist in the New Hampshire, Constitution Art. 14., and finds the court that these same policy arguments apply under the Federal Constitution.

The reasoning in both the Gonzales and McLellan opinion were cited by the Supreme Court of Vermont in State v. Dean, 536 A.2d 909 (Vt.1987) when it held that the speedy trial guarantee applies to sentencing.

The majority of courts which have addressed this issue have found a right to speedy sentencing under the Sixth Amendment of the United States Constitution, and only a small minority of state courts have adopted the opposite view.

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IV.

THE COURT OF APPEAL'S REMEDIES TO ALLEVIATE PREJUDICE WERE BOTH LEGAL AND PROPER GIVEN THE FACTS PRESENTED IN THIS CASE.

The court of appeals properly found that Burkett suffered prejudice under Moore v. Arizona, supra and Strunk v. United States, supra. The petitioner argues here that the court of appeals did not distinguish between prejudice before trial and prejudice in the post-conviction context and this Court should grant the writ to address this collateral issue. (Petition for Writ of Certiorari, page 28).

The court of appeals correctly noted that other courts of appeals have applied the Barker analysis to delays in post-conviction proceedings. United States v. Reese, 568 F.2d 1246, 1253 (6th Cir. 1977); United States v. Campbell, 531 F.2d 1333 (5th Cir. 1976), cert. denied., 434 U.S. 851 (1977); Perez v. Sullivan, 793 F.2d 249, 254 (10th Cir. 1986).

The court of appeals carefully considered the delay as prejudice under both the Speedy Trial Clause and the Due Process Clause. See court of appeals' opinion specifically at P-App. 45-54 and 58-61). While the court of appeals distinguished between the prejudice under the Sixth Amendment and the prejudice under the Due Process Clause, it viewed them cumulatively as to the effect on Burkett's emotional state.

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The petitioner argues then with the facts as found by the court of appeals based on the uncontested facts in the record.[15] The district attorney flatly states that Burkett's assertion of "anxiety" is bogus (Petition for Writ of Certiorari, page 30) and that the state could not present contrary evidence of such self-serving subjective assessments. But the petitioner is simply trying to justify his failure to present any contrary evidence on Burkett's emotional state in the district court.

The district attorney had ample means to contradict the evidence presented by Burkett, if any such evidence existed, by presenting Burkett's cellmates, the guards from the county jail and even Burkett's court-appointed lawyers, who had been removed when they did not act to move his case forward.

The district attorney simply failed to present any evidence to rebut Burkett's evidence of emotional deterioration as a result of the delay in his case. The district attorney having failed to present evidence on this point now simply calls Burkett's assertion of anxiety "bogus."

Furthermore, the petitioner simply ignores the fact that every court that ever examined Burkett's claims has found, and, as the district attorney conceded in the district court and the court

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15 The petitioner incorrectly states that the Court of Appeals found prejudice based on the dimming of Burkett's witnesses at retrial. But the court of appeals did not find prejudice on that ground. It specifically noted that in Moore v. Arizona, 414 U.S. at 26-27, this Court rejected a reading of Barker to confine prejudice to prejudice at retrial and instead recognized personal prejudice as being legal prejudice in this context. See also the Court of Appeals' discussion of prejudice at appendix page 58-61.

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of appeals, that Burkett, time after time asserted his rights to a speedy disposition in every conceivable way short of rioting in the prison: appeals in the Superior Court of Pennsylvania, habeas corpus petitions in Blair County, and federal habeas corpus actions. Certainly one can well imagine the anxiety that preceded and accompanied these actions and the anxiety that was brought about by subjecting himself to retaliation from the Blair County judge when he finally did come up for sentencing.

The petitioner does not heed the admonition by this Court and recognized by the court of appeals that the assertion of the right to a speedy trial is entitled to great evidentiary weight on the issue that his rights are being violated, (P-App. 60) where the court of appeals stated "Burkett's assertion of his right strongly tips the scale in Burkett's favor." This statement by the court of appeals follows this Court's admonition in Barker that the assertion of the defendant's right to a speedy trial is entitled to great evidentiary weight:

> The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.

See Barker v. Wingo, 407 U.S. at 531-532.

The petitioner also attempts to raise in its petition, although not presented as a formal question, the court of appeals treatment of the reason for delay. The petitioner argues that the Constitution cannot possibly require a "short-strapped county" to

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devote as much of its judicial resources to post-trial matters as it does to pretrial matters because those accused of crimes must be dealt with first.

But the court of appeals pointed out that Blair County did not devote its resources to either pre-trial matters or post-trial matters, it simply ignored both, as evidenced by the facts recited in Burkett I at 1212, that the district attorney sought several continuances of Burkett's case over Burkett's objections before trial of this case.

Secondly, the court administrator observed the courts of Blair County closed down for two months in the summer while Burkett's post-trial motions were pending. (P-App. 56). Burkett's state habeas corpus petition was thus ignored for seven months despite the judge's promise that a decision would be rendered within a week. (P-App. 38).

The petitioner here acts as if Burkett's case occurred in isolation from other cases, but in fact the entire delay problem in Blair County Courts lead to numerous cases involving denial of speedy trial rights and due process violations, as recited by the court of appeals. (See court of appeals opinion, P-App. 3-4).[16]

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16 The petitioner argues in footnote 15 on page 37 that the Pennsylvania Appellate Courts frequently resolve appeals without waiting for an opinion in the lower court. The petitioner ignores Commonwealth v. Kinsel, 403 Pa.Super. 67, 588 A.2d 34 (1991), which held in an appeal involving complex issues as were presented in Burkett's case, that the case had to be remanded in order for the trial judge to file an opinion in conformance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

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v. 8/82)

The problems faced by the court of appeals in this case was an endemic problem involving the Blair County Court either ignoring the orders of the federal court, and after even being made aware of the disposition of the court of appeals was going to invoke as announced in Burkett I, chose to ignore delay problems that were occurring and to close their courts for two months in the summers.

The petitioner, as a representative of the Commonwealth of Pennsylvania, is ill placed to complain when the court of appeals have to take time from its busy dockets to address problems and effectuate remedies for constitutional violations caused by the delay in the Blair County courts, that occur even after the court of appeals has addressed the problems many times, and when the Commonwealth, through its legislature and appellate courts could readily have addressed these problems.

The district attorney states on page 9 of its petition that the cause of the backlog in Blair County is the shortage of judges and that shortage could only be rectified by the state legislature.

The court of appeals did not find that the shortage of judges caused the delay in Blair County, but that it was caused by mismanagement and the fact that the Blair County court was closed for two months every summer. (See court of appeals opinion at P-App. 31-33, 38). Even assuming that the state legislature was at fault, this does not excuse the state's violation of Burkett's constitutional rights to a speedy trial and due process. (See

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Barker, 407 U.S. at 531, where this Court stated that overcrowded courts should be weighed less heavily, but nevertheless be considered because the ultimate result of such circumstances must rest with the government rather than with the defendant.)

In his dissenting opinion, (P-App. 79, 81) Judge Alito expresses dissatisfication with the majorities reliance on Burkett's testimony on the issue of prejudice. He seems to be advocating a higher standard of proof when passing on the question of prejudice to criminal defendants. Certainly, Burkett was competent to testify concerning his emotional distress and anxiety and its subjective manifestations, as well as, the availability of programs at different institutions where he was incarcerated. Certainly the Commonwealth had the opportunity to rebut this testimony as to the prison programs, but it chose not to do so. It also had the right to object to the competency of Burkett to testify as to matters concerning his emotional distress, but it did not do so. Had the Commonwealth objected and that objection been sustained, Burkett could have taken steps to secure other admissible evidence from more objective sources.

On page 38 of his petition, the district attorney states flatly that as in the pre-accusation setting, delays after conviction should not entitle a defendant to challenge "his otherwise proper judgment absent an intent by the state to gain a tactical advantage." Such a rule would require that the court overrule Evitts v. Lucey, 469 U.S. 387 (1985) and Griffin v. Illinois, 351 U.S. 12 (1956), which established procedural due

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(Rev. 8/82)

process safeguards for criminal defendants, not only at the trial level, but also on their appeals as of right. See **Burkett I** at 1219.

As this Court stated in Barker, a delay even if not intentional on the part of the state still weighs against the state. The suggestion by the district attorney that only intentional delay to gain a tactical advantage by the state would allow the state to simply ignore the defendant once found guilty until he died or was released. Such a rule would emasculate the federal courts from protecting criminal defendants from the total indifference by the state regarding their rights to be promptly sentenced and would thwart their rights to appeal. Certainly, the Due Process Clause must insure that criminal cases are brought to a meaningful and prompt conclusion.

The due process rules laid down by this Court are not only designed to safeguard criminal defendants from a state's gaining a tactical advantage, but also to protect defendants from the state's deliberate indifference in processing their criminal cases. Here, even in the face of many protestations by Burkett regarding the delay, which alerted the state to its constitutional obligations, the state's apparatus simply chose to ignore his constitutional rights. That is the essence of the violation found in Burkett I and Burkett III and why Burkett is entitled to the relief granted by the court of appeals.

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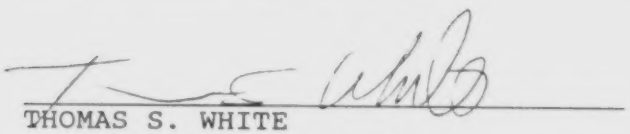
(Rev. 8/82)

CONCLUSION

For the foregoing reasons the petition of the district attorney of Blair County for writ of certiorari should be denied.

Respectfully submitted,



THOMAS S. WHITE
Federal Public Defender
Counsel of Record

KAREN SIRIANNI GERLACH, Assistant
Federal Public Defender

DENNIS M. STEFAN, Esq.

AO 72A
Rev. 8/82)

CERTIFICATE OF MEMBERSHIP IN BAR

I, THOMAS S. WHITE, Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

THOMAS S. WHITE
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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CLERK, U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

WAYNE BURKETT,
Petitioner
v.
RICHARD CUNNINGHAM,
Warden of Blair County Prison, et. al.:
Respondent

85 0769

CASE NO. 85-0769

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PETITION FOR WRIT OF HABEAS CORPUS

AND NOW, this 8th day of MARCH, 1985, comes the above-named Petitoner, Wayne Burkett, by and through his attorney, Public Defender, John Woodcock, Jr., Esquire, and files the following petition for Writ of Habeas Corpus:

1.

That the Petitioner, Wayne Burkett, was the defendant in four (4) seperate criminal cases held in the county of Elair, state of Pennsylvania to wit Criminal Action Numbers 140, 141, 161 of 1981 and 284 of 1982.

2.

That on November 17, 1981, a verdict was returned by a jury finding the defendant guilty under C.A. NO. 140 of 1981 of Burglary; Theft; Receiving Stolen Property; Terroristic Threats; and Corruption of Minors and under C.A. NO. 141 of 1981 Burglary; Theft; Receiving Stolen Property and Terroristic Threats.

3.

That on January 20, 1982 the defendant was found guilty, by a jury, under C.A. NO. 161 of 1981 of Rape; Involuntary Deviate Sexual Intercourse; Unlawful Restraint; Indecent Exposure; Terroristic Threats; Recklessly Endangering

APPENDIX 1a

Another Person; Indecent Assault and Aggravated Assault.

4.

That on January 28, 1984, the defendant was found guilty, by a jury, under C.A. NO. 284 of 1982 of Criminal Attempt (rape); Burglary; Recklessly Endangering Another Person; Terroristic Threats and Simple Assault.

5.

That the defendant, except for forty-eight (48) days has been incarcerated since his original arrest on the 7th day of February, 1981 in connection with the first of two of these charges.

6.

That in none of the cases have any opinions been filed on the defendant's timely post-trial motions, although argument was scheduled on the last of the cases and not heard.

7.

That the defendant has on a number of occasions demanded in writing that the matter be disposed of.

8.

That almost four (4) years has lapsed since his original arrest and conviction. The defendant remains unsentenced as of this date.

9.

That on or about March 6, 1984, the defendant filed similar petition for Writ of Habeas Corpus in Blair County. See Exhibit "A". That hearing was held on October 11, 1984 and no decision has resulted from that hearing in spite of repeated requests by the defendant. Therefore, the defendant's civil rights under the Federal Constitution have been violated and a direct filing of this Writ with the District Court is proper under the circumstances due to the inordinate delays of the Lower Courts of Blair County and disposing

of the matters heretofore and heretoafter complained of.

10.

That the Defendant believes, and therefore avers, that he has been denied his Constitutional right to a speedy trial by virtue of the fact that he has not been sentenced for nearly a period of four (4) years following his conviction on these charges. Further, he believes he is prejudiced. Further, he believes, and therefore avers that the length of said delay is exorbitant. That there is no justified reason for his delay and he has been prejudiced by the same.

WHEREFORE, the Petitioner prays this Honorable court to issue a Rule upon Richard Cunningham, Warden of the Blair County Prison, to show cause why Petitioner should not be discharged from custody and the charges against him dismissed with prejudice to the Commonwealth of Pennsylvania.

Respectfully submitted:

John Woodcock, Jr., Esquire
Public Defender

(5) a3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WAYNE BURKETT, Petitioner,	:	
vs.	:	CIVIL ACTION NO. 85-0769
RICHARD CUNNINGHAM, Respondent.	:	

ANSWER TO PETITION FOR
HABEAS CORPUS RELIEF

AND NOW, comes the above-named Respondent, RICHARD CUNNINGHAM, by and through his attorney, Ellen L. Cohen, First Assistant District Attorney of Blair County, and answers the Petition for Habeas Corpus Relief as follows:

1. Admitted that the Petitioner, WAYNE BURKETT, is the Defendant charged at Blair County Criminal Action Numbers 140, 141 and 161 of 1981, together with 284 of 1982. (Copy of Prothonotary's dockets are attached.)

2. Admitted that after a jury trial held on November 9 and 10, 1981, before the Honorable Judge John A. Cherry on Criminal Actions 140 and 141 of 1981, Petitioner was found guilty of the charges.

3. Admitted that after a jury trial held on January 18, 19 and 20, 1982, before the Honorable Judge R. Bruce Brumbaugh on Criminal Action Number 161 of 1981, the Petitioner was found guilty of the charges. A transcript of the trial is available.

APPENDIX 2a

4. Admitted that after a jury trial held on January 26 through 28, 1983, before the Honorable President Judge Thomas G. Peoples, Jr., on Criminal Action Number 284 of 1982, the Petitioner was found guilty of the charges. A transcript of the trial is available.

5. Admitted that the Petitioner has been incarcerated for the periods stated. On February 24, 1982, upon motion of the Petitioner, bail was reduced on Criminal Action Numbers 140, 141 and 161 of 1981. Said bail was posted on February 24, 1982. Petitioner was charged with a subsequent offense (that being 284 of 1982) and reincarcerated on April 13, 1982. On May 28, 1982, Respondent moved for revocation of bail at Criminal Action Numbers 140, 141 and 161 of 1982. After a hearing upon said motion on August 27, 1982, bail on Criminal Action Numbers 140, 141 and 161 of 1981 was increased. The total bail required of Petitioner is $275,000 on all four criminal actions.

6. Admitted. Briefs have been filed in Criminal Actions 161 of 1981 and 284 of 1982. An answer to the post-verdict motion was filed at Criminal Actions 140 and 141 of 1981. Argument was scheduled on Criminal Action 284 of 1982 on January 23, 1985. The brief in the case at 161 of 1981 was filed on behalf of Petitioner on or about December 21, 1982. The brief in the case at 284 of 1982 was filed on behalf of Petitioner on January 18, 1985.

7. Admitted. The Petitioner has filed with the Court of Common Pleas a Petition for a Writ of Habeas Corpus (attached to this answer), a Petition for a Writ of Mandamus (attached to this

answer), at the Superior Court a Petition to Review the Habeas Corpus Petition (attached to this answer), a Petition for Withdrawal as Counsel was filed (attached to this answer) which was denied by Order dated August 6, 1984 (attached to this answer), an Application for Evidentiary Hearing on an issue of ineffectiveness of counsel (attached to this answer), which was denied by the Court on April 2, 1985 (attached to this answer) and an Appeal of the Order of April 9, 1985, to the Superior Court (attached to this answer).

The Petition for Habeas Corpus Relief was filed on March 12, 1984. Hearing on the Petition occurred on October 9, 1984. The subsequent papers filed in the Superior Court were filed on December 13, 1984.

The Application for the Evidentiary Hearing was filed on or about September 3, 1984. At the argument set for January 23, 1985, this Petition came to light (transcript is attached to this answer). The matter was rescheduled and heard on April 1, 1985. By Order dated April 2, 1985, the Petition was denied. On or about April 9, 1985, the Petitioner filed an appeal to the Superior Court on this matter requesting on Criminal Action 284 of 1982: 1) all proceedings be stayed and 2) all documents relating to his case be delivered to Petitioner.

8. Admitted in part. At Criminal Action numbers 140 and 141 of 1981, three (3) years and five (5) months have elapsed since trial. At Criminal Action 161 of 1981, three (3) years and three (3) months have elapsed since trial. At Criminal Action 284 of 1982, two (2) years and

three (3) months have elapsed since trial.

9. Admitted in part. Denied in part. As stated at Paragraph Seven (7), numerous documents have been filed. The earliest document was filed on or about March 12, 1984. Prior to that time, bail had been reduced, as requested, once, and increased as a result of difficulties Petitioner involved himself in. The documents filed by the Petitioner together with his counsel's actions since the same have been filed, have been part of the cause of delay. Whether the Petitioner's rights have been violated is a legal issue which Respondent does not admit.

10. Denied. This is a legal conclusion not supported by the facts of this matter.

NEW MATTER

11. Paragraphs One (1) through Ten (10) are incorporated by reference.

12. By virtue of the filing of the Appeal to the Superior Court on the Habeas Corpus matter, the Petitioner has taken jurisdiction from the Court of Common Pleas to resolve this issue. (Pa. R.A.P. 1701(a).)

13. By virtue of the filing of the Appeal to the Superior Court on the Evidentiary Hearing on ineffective assistance of counsel at Criminal Action 284 of 1982, the Petitioner has taken jurisdiction from the Court of Common Pleas to resolve the post-verdict motions at 284 of 1982 (Pa. R.A.P. 1701(a).)

14. Since the time bail was increased on August 27, 1982, no new Petitions for reduction of bail have been filed.

15. Petitioner has inundated the Court of Common Pleas with so many Petitions and requests, it has become frustrating. In addition to the above-stated motions, Petitioner has filed: a Petition to prohibit searches of his jail cell (dated January 18, 1985); an application for Evidentiary Hearing on ineffectiveness of counsel at Criminal Action Number 161 of 1981 (dated August 14, 1984); an application for Evidentiary Hearing on ineffectiveness of counsel at Criminal Action Numbers 140 and 141 of 1981 (filed on December 3, 1984) which was answered by Order dated January 7, 1985; and Petition for transcript at Criminal Action Numbers 140 and 141 of 1981 (filed on or about January 14, 1985).

16. Petitioner asserts no basis for a finding of prejudice but rather makes a bald assertion. The cases of United States ex rel Johnson vs. Keve, 383 F.Supp. 849 (Del., 1974), affirmed 517 F.2d 1400, cert. den. 96 S.Ct. 189, 423 U.S. 892, Brady vs. Superintendent, 443 F.2d 137 (4th Cir., 1971), United States vs. Campbell, 531 F.2d 1333 (5th Cir., 1976), United States vs. Campisi, 583 F.2d 692 (3rd Cir., 1978) and United States vs. Nunn, 435 F.Supp. 294 (N.D. Ind., 1966) all state that the Petitioner must show actual prejudice visited upon him by virtue of the delay. Inasmuch as none is asserted, none can be found.

17. As a result of the various convictions, Petitioner could be sentenced to a term of incarceration as follows: At Criminal Action

Numbers 140 and 141 of 1981, a period of seventeen and one-half (17½) years to thirty-five (35' years; at Criminal Action Number 161 of 1981, a period of eighteen and one-half (18½) years to thirty-seven (37) years; at Criminal Action 284 of 1982, a period of twenty-five (25) years to fifty (50) years. In total, Petitioner could be sentenced to sixty-one (61) years to one hundred twenty-two (122) years. Pennsylvania Courts have stated that a delay which did not extend beyond the collective maximum term of imprisonment for offenses which result in conviction do not render a sentencing prima facie invalid. Commonwealth vs. Pounds, 490 Pa. 621, 417 A.2d 597 (1980).

WHEREFORE, the Attorney for the Respondent respectfully requests the Court to deny and dismiss the Petition for Habeas Corpus Relief.

Respectfully submitted.

Ellen L. Cohen

Ellen L. Cohen, Esquire
Attorney for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WAYNE PAUL BURKETT, Petitioner	)	
	)	
v.	)	Civil Action No. 85-1965
	)	
RICHARD CUNNINGHAM, Respondent	)	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. SECTION 2254

AND NOW, comes the Petitioner, Wayne Paul Burkett, by his counsel, Joel B. Johnston, of the Federal Public Defender's Office, and files this Amended Petition for Writ of Habeas Corpus under 28 U.S.C. Section 2254. The Petitioner herein avers the following violations of his constitutional rights:

1. The Petitioner suffered violations of his Fifth and Sixth Amendment rights as guaranteed under the Fourteenth Amendment, due to the inordinate and unjustifiable delay of the Blair County Court of Common Pleas in proceeding to sentencing of his case and thereafter processing the necessary record for his direct appeal.

2. Petitioner suffered a violation of his Fifth Amendment due process rights, as those rights are guaranteed under the Fourteenth Amendment, where the trial court allowed highly prejudicial cross-examination of Petitioner about evidence of other crimes.

APPENDIX 3a FILE

3. The Petitioner suffered a violation of his Sixth Amendment right to counsel, as guaranteed under the Fourteenth Amendment, through the ineffective representation of his trial attorney. With regard thereto, Burkett was incompetently and ineffectively represented by trial counsel, John Woodcock, Esquire, at all stages of the proceedings, including, but not limited to, the following specific allegations:

(a) In failing to move for a change of venue, in light of the extensive pretrial publicity surrounding this and previous cases involving Burkett;

(b) In failing to pursue, locate and interview material witnesses - Cindy Weyandt, Brad Laratonda, and Doug Hoover - to the incidents immediately proceeding and subsequent to the alleged attack on the prosecutrix;

(c) In stating to the jury during opening statements that he would produce an actual eyewitness, Doug Hoover, who would rebut the prosecutrix' version of the offense, when in fact, said witness was never subpoenaed, directly interviewed, or called as a witness, and whose absence was never explained to the jury;

(d) In failing to request the trial court to poll the jury, for purposes of declaring a mistrial, regarding possible exposure during trial to prejudicial newspaper

articles recounting Burkett's previous convictions for similar offenses;

(e) In failing to file proper pretrial in limine motions to exclude references during trial to two previous convictions of Burkett regarding terroristic threats against other women;

(f) In failing to properly challenge the trial court's decision to allow cross-examination of Burkett regarding evidence of other crimes, and to allow the court to permit such cross-examination without first conducting a proper balancing test of the probative value of allowing such versus its prejudicial effect on the record;

(g) In failing to object to the court's charge where there was no instruction addressing the prosecutrix' delay in reporting the underlying offense to the police;

(h) In failing to file timely post-trial motions to modify or reconsider the defendant's sentence, where the sentence given impermissibly took into consideration conduct by Burkett occuring after the date of the charged offense in deciding to give Burkett a maximum sentence;

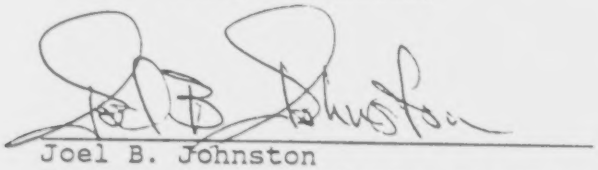
(i) In failing to file timely post-trial motions to

modify or reconsider the sentence given based upon the trial judge's imposition of separate sentences for offenses which merged;

(j) In failing to file a timely notice of appeal to the Superior Court within the statutory time limit.

4. Burkett herein specifically requests an evidentiary hearing to be held pursuant to 28 U.S.C. Section 2254(d), at which time the facts underlying the claims presented in this Amended Petition for habeas corpus relief can then be established as a matter of record. In preparation for any such hearing which is ordered, counsel hereby requests leave of Court to initiate discovery under the Federal Rules of Civil Procedure, as required under Rule 6(a) (of 28 U.S.C. Section 2254).

Respectfully submitted,



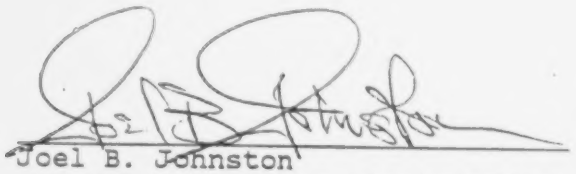
Joel B. Johnston
Federal Public Defender's Office

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 10th day of November, 1987, to the following:

Ellen Cohen
Assistant District Attorney
Blair County Courthouse Annex No. 1
Hollidaysburg, Pennsylvania 16648

Wayne Paul Burkett
Drawer R
Huntingdon, Pennsylvania 16652



Joel B. Johnston
Federal Public Defender's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WAYNE PAUL BURKETT, Petitioner,	:	
vs.	:	CIVIL ACTION NO. 85-1965
RICHARD CUNNINGHAM, Respondent.	:	

ANSWER TO AMENDED PETITION FOR
WRIT OF HABEAS CORPUS

AND NOW, comes Respondent, RICHARD CUNNINGHAM, by his counsel, ELLEN L. COHEN, First Assistant District Attorney of Blair County, Pennsylvania, and files this Answer to the Amended Petition for Writ of Habeas Corpus under 28 U.S.C. Section 2254. The Respondent herein answers the allegations as follows:

1. Denied.

2. Denied.

3. Denied in part.

(a) Denied;

(b) Denied;

(c) Denied;

(d) Denied;

(e) Denied;

(f) Denied;

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WESTERN DISTRICT OF PENNSYLVANIA

APPENDIX 4a

(g) Denied;

(h) Denied;

(i) Denied;

(j) Admitted.

4. No answer is necessary.

Respectfully submitted,

Ellen L. Cohen
First Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WAYNE BURKETT, Petitioner	)	
v.	)	Civil Action No. 85-769
RICHARD CUNNINGHAM, Respondent	)	

6

MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the petition of Wayne Burkett for a writ of habeas corpus be dismissed, and that a certificate of probable cause be denied, unless the Court of Common Pleas fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60) days. It is further recommended that in the event that Court fails to act in accordance with this directive, that the petitioner file a new petition, that jurisdiction on the merits be assumed by this Court and that an appropriate merits determination be made.

II. Report

Wayne Burkett, pro se, has presented a petition for a writ of habeas corpus. In a Rule and Order entered on March 29, 1985, leave to proceed in forma pauperis was granted and the respondent and the District Attorney of Blair County were directed to file an answer and show cause, if any, why the relief sought should not be granted.

APPENDIX 5a

On November 17, 1981 the petitioner was convicted by a jury of burglary, theft by unlawful taking or disposition, receiving stolen property, terroristic threats and corruption of minors at No. 140 of 1981 in the Court of Common Pleas of Blair County.

On November 17, 1981, he was also convicted by a jury of burglary, theft by unlawful taking or disposition, receiving stolen property and terroristic threats at No. 141 of 1981 in the Court of Common Pleas of Blair County.

On January 20, 1982, the petitioner was convicted by a jury of rape, involuntary deviate sexual intercourse, indecent assault, indecent exposure, unlawful restraint, aggravated assault, recklessly endangering another person and terroristic threats at No. 161 of 1981 in the Court of Common Pleas of Blair County.

Finally, on January 28, 1983 he was convicted by a jury of criminal attempt (rape), burglary, recklessly endangering another person, terroristic threats and simple assault at No. 284 of 1982 in the Court of Common Pleas of Blair County.

The respondent concedes that timely post trial motions were filed in all cases, and despite the passage of three and a half years since his first two convictions and almost twenty-eight months since his last conviction, the post trial motions have not yet been disposed of by the Court of Common Pleas, and the

plaintiff remains in custody. [1] Because of the pendency of the post trial motions sentence has not yet been imposed and the petitioner is unable to seek relief in the appellate courts of the Commonwealth. [2] Thus, it would appear that the petitioner has been in continuous custody on some of these charges for a time period of four years since his arrest and three and a half years since his conviction, and has not yet been sentenced.

It is provided in 28 U.S.C. §2254(b) that:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

This statute reflects a codification of the well-established concept which requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to that state's highest court for consideration. Preiser v. Rodriguez, 411 U.S. 475 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Hill v. Zimmerman, 709 F.2d 232 (3d Cir. 1983).

1. We note that although convicted in Blair County, the petitioner is incarcerated in Cambria County Jail.

2. Pa. R. A. P. 301, 341.

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. Preiser v. Rodriguez, supra.; Beaty v. Patton, 700 F.2d 110 (3d Cir. 1983).

In those instances where inordinate delay has occurred, the exhaustion requirement will not be imposed. Codispoti v. Howard, 589 F.2d 135 (3d Cir. 1978); United States ex rel. Geisler v. Walters, 510 F.2d 887 (3d Cir. 1975). In addition, an individual will not be required to seek extraordinary relief from the state courts, nor will he be required to engage in exercises in futility. Beaty v. Patton, 700 F.2d 110 (3d Cir. 1983).

The Sixth Amendment right to a speedy trial has been made applicable to the states through the Due Process clause of the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967). While it would appear that the Supreme Court has not determined whether the speedy trial mandate of the Sixth Amendment applies to the sentencing phase of the prosecution, it would appear that the Court of Appeals for this Circuit has so held. United States v. Campisi, 583 F.2d 692 (3d Cir. 1978). See also: Tinghitella v. State of California, 718 F.2d 308, 313 (9th Cir. 1983). Thus it would appear that the instant case may be reviewed to determine whether or not a speedy trial violation has occurred.

In considering a claim that the Constitutional right to a speedy trial has been denied, a court must consider four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972); Sadler v. Sullivan, 748 F.2d 820, 825 (3d Cir. 1984).

A. Length of Delay

The facts of this case are not in dispute. The petitioner has been continuously incarcerated since February 7, 1981 with the exception of a forty-eight day period between February 24, 1981 when he was released on bail and April 13, 1981 when he was arrested on other charges and his bail increased. Convictions on two informations were secured on November 17, 1981; on another information on January 20, 1982, and the petitioner was convicted on the fourth information on January 28, 1983. Thus, he has been in continuous custody on these charges for a period in excess of four years, and for three and a half years since his first two convictions. 3/

B. Reason for the Delay

While the Commonwealth does not set forth any specific reason for this delay, in its answer it is alleged that the petitioner "has inundated the Court of Common Pleas with so many

3. We note that apparently in the wake of this action, on April 2, 1985, the Court of Common Pleas directed that its Court Administrator schedule a hearing on the post-trial motions at "the earliest possible date consistent with the calendar of the Court."

Petitions and requests, it has become frustrating." As is set forth below, the petitioner has attempted on many occasions to gain relief in the Court of Common Pleas as well as in the Superior Court of Pennsylvania. However, in view of the delay that has occurred it would not appear that his acts of "innundating" the court are unreasonable.

Other than this allegation, the Commonwealth does not offer any explanation for the delay, and we note that this case is just one in a series of habeas corpus petitions filed in this Court in which the issue of unreasonable delay in Blair County Courts has been raised.

While no explanation for the delay has been offered, we do note parenthetically, that at least for federal speedy trial purposes delay occassioned by congested courts calendars weighs less heavily in considering alleged Sixth Amendment claims. United States v. Nance, 666 F.2d 353 (9th Cir. 1982), cert. denied 456 U.S. 918 (1982); United States v. Van Dyke, 605 F.2d 220 (6th Cir. 1979), cert. denied 444 U.S. 994 (1979).

C. Assertion of the Right

The Court in Barker noted that the "failure to assert the right will make it difficult for a defendant to prove that he has been denied a speedy trial." 407 U.S. at 532. Nevertheless, it

was also noted that the primary obligation is placed on the courts and prosecutors to assure that cases are promptly terminated. 407 U.S. at 527, 529. Having once obtained a conviction, the prosecutor and the courts cannot simply hold a matter in indefinite abeyance rather than bringing about the completion of all related proceedings.

In both the petition and the answer of the Commonwealth, it is conceded that the petitioner has sought habeas corpus relief in the Court of Common Pleas and in the Superior Court of Pennsylvania, as well as relief in the nature of mandamus. Additionally, from the tone of the answer, it would appear that the petitioner has "innundated" the local courts with petitions and requests. However, the nature of these documents is not set forth in the record, and we will not speculate on their contents. Suffice it to say, it is apparent from what has been presented here that the petitioner has repeatedly sought to have the matter disposed of by the Court of Common Pleas, and that his efforts have been unsuccessful.

D. Prejudice to the Petitioner

As the Court recognized in Smith v. Hooey, 393 U.S. 374, 378 (1969), where delay occurs, an individual may lose certain advantages such as receiving concurrent sentences and may even receive an enhanced sentence.

While the extent of prejudice cannot be measured with exactitude, it would appear reasonable to conclude that the delay by the Blair County courts has caused some loss to the petitioner.

The instant case is one in which a defendant in criminal cases pending in Blair County has been continuously incarcerated in excess of four years since his arrest, and in excess of three and a half years since his first convictions, and has not yet been sentenced. While we are aware from other habeas corpus cases which have been presented to this Court that unusual circumstances have prevailed from time to time in Blair County resulting in delays in disposing of criminal cases, we are also mindful of the maxim that justice delayed is justice denied.

While the Blair County Courts undoubtedly have many pressing matters pending at any one time, it would appear to be a fundamental denial of the constitutionally assured right to a speedy trial to delay ruling on post-trial motions far in excess of three years. We do note that since the pendency of the action in this Court, the Court of Common Pleas has apparently ordered that a hearing be scheduled. However, there is no indication of when the matter will be set for hearing, and when it might be anticipated that the motions will be determined.

Nevertheless, in view of the fact that the petitioner could recieve a sixty-one to a one hundred and twenty-two year sentence, it would appear that the degree of prejudice which might have occurred is not as critical as in some other Blair County cases where the possible period of incarceration is much shorter. For this reason, and in view of the fact that the matter is to be scheduled, it would appear appropriate to withhold any action, to permit the Court of Common Pleas to promptly resolve this matter.

Accordingly, it is respectfully recommended that the petition of Wayne Burkett for a writ of habeas corpus be dismissed, and that a certificate of probable cause be denied, unless the Court of Common Pleas fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60)days. It is further recommended that in the event that Court fails to act in accordance with this directive, that the petitioner file a new petition, that jurisdiction on the merits be assumed by this Court and that an appropriate merits determination be made.

Respectfully submitted,

Robert C. Mitchell

ROBERT C. MITCHELL
United States Magistrate

Dated: May 15, 1985

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WAYNE BURKETT,
Petitioner

v. Civil Action No. 85-769

RICHARD CUNNINGHAM,
Respondent

(9 and 4)

ORDER

AND NOW, this 30 day of May, 1985, after a petition for a writ of habeas corpus was filed by Wayne Burkett, and after the Report and Recommendation of the United States Magistrate was filed and the parties were granted ten days to file objections thereto, and no objections having been filed, and upon independent review of the petition and the record, from which it appears that there has been a delay in disposing of the petitioner's post-trial motions, and upon consideration of the Report and Recommendation of the Magistrate which is adopted and incorporated as the opinion of this Court,

IT IS ORDERED that the petition of Wayne Burkett for a writ of habeas corpus is dismissed and that a certificate of probable cause is denied, unless the Court of Common Pleas of Blair County fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60) days.

IT IS FURTHER ORDERED that in the event that the Court fails to act in accordance with this directive that the petitioner file a new petition, that jurisdiction on the merits be assumed by this Court and that an appropriate merits determination be made.

Gerald J. Weber
United States District Judge

cc: John Woodcock, Jr., Esq.
Court House Annex #1
Hollidaysburg, PA 16648

Attorney General of PA
564 Forbes Avenue
Pittsburgh, PA 15219

District Attorney of
Blair County
Court House
Hollidaysburg, PA 16648

Honorable Robert C. Mitchell
United States Magistrate

Certified from the Record
Date 6-10-85

PETITIONER'S EXHIBIT 126

APPENDIX 69

824 F2d 208

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3074 & 86-3121

WAYNE PAUL BURKETT,

Appellant

v.

RICHARD CUNNINGHAM, WARDEN

Appellee

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil Nos. 85-1965 & 85-1966)

Argued April 10, 1987

Before: SLOVITER, BECKER and GARTH,
Circuit Judges

(Filed July 10, 1987)

GEORGE E. SCHUMACHER
JOEL B. JOHNSTON (Argued)
Federal Public Defender
415 Convention Tower
960 Penn Avenue
Pittsburgh, PA 15222

Attorney for Appellant

RECEIVED
JUL 15 1987
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF PENNSYLVANIA

APPENDIX 7a

ELLEN L. COHEN (Argued)
Blair County District
Attorney's Office
Courthouse Annex #1
Hollidaysburg, PA 16648

Attorney for Appellee

BECKER, *Circuit Judge*.

These two habeas corpus appeals by Wayne Paul Burkett, arising out of three state court convictions, require us to determine whether a federal court, presented with post-conviction delay ranging from excessive to monumental, should not only deem state remedies exhausted, but also grant writs of habeas corpus on account of the delay. Each of the convictions took place in the Blair County, Pennsylvania, Court of Common Pleas, where the problem of delay seems endemic. *See infra* at 46-47 & n.48.

In No. 86-3074, we confront a delay of two years and four months between conviction and sentencing, plus several additional months of delay during the state appellate process. No. 86-3121 encompasses two separate convictions. In one, we face a three and one-half year delay between conviction and sentencing and a further, ongoing delay (approximately one year and nine months at this writing) in the commencement of the state appellate process because of the tardiness of the Blair County court system both in furnishing an opinion on post-verdict motions and sentencing and in transmitting the trial record to the Pennsylvania Superior Court. In the other, we confront an almost unbelievable situation: Burkett has yet to be sentenced, more than five and one-half years after trial and two years after a federal district court declared that Burkett's right to a speedy trial would be violated if he were not sentenced within 60 days.

As a preliminary procedural matter, we observe that in No. 86-3121 the district court used Federal Rule of Civil Procedure 60(b) to vacate and reenter its previous order of judgment, in effect extending the time for appeal, because Burkett, despite due diligence, did not learn of the entry of judgment until after expiration of the period for requesting an extension of time to appeal. Fed. R. App. P. 4(a)(5). Under the particular circumstances of the case, we hold that the district court had the power to vacate and reenter the final order.

We also must make important threshold legal determinations. First, does the Constitution's Speedy Trial clause apply through the sentencing phase of the prosecution? We conclude that it does. Second, does the Due Process clause protect against delays in appeals as of right? We also conclude that it does. For the reasons that follow, we will affirm the district court's dismissal for want of exhaustion in No. 86-3074. We will reverse the court's dismissal for want of exhaustion in No. 86-3121, and, on those claims concerning the case for which Burkett has been sentenced but his appeal hindered, we will remand for consideration of the merits of Burkett's constitutional claims, including the delay itself. That leaves for consideration the conviction for which Burkett has still not been sentenced for five and one-half years after verdict, two years of which follow the district court's order declaring that the Constitution required sentencing within 60 days, an order predicated on a finding of a speedy trial violation which was not challenged by the county. The violation having been established as law of the case, and reinforced by the continuing delay, and the county having conceded at oral argument that the only appropriate remedy appears to be dismissal, we will remand the case to the district court with instructions to grant the writ

unconditionally and discharge Burkett from that conviction.

I. *PROCEDURAL HISTORY*

The factual matrix of these appeals lies in the procedural history of Burkett's criminal cases. That history is extremely involved, and resolution of these appeals requires that we set it forth in detail.

A. *State Courts: Round I*

Burkett was arrested on February 7, 1981 and charged in the Blair County Court of Common Pleas with the crimes later detailed in criminal actions Nos. 140 and 141 of 1981 ("140/141").[1] Six days later, he was charged with the crimes detailed in criminal action No. 161 of 1981 ("161").[2] On July 22, 1981 the prosecution moved under Pennsylvania Rule of Criminal Procedure 1100(c) to extend the 180-day deadline for commencing trial otherwise required under Rule 1100(a)(2). On October 7, 1981 the court, despite Burkett's objection and motion to dismiss, granted the prosecution's request.

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1. Information Nos. 140 and 141 of 1981 were both filed March 17, 1981. Each charged Burkett with the felonies of burglary, rape, and involuntary deviate sexual intercourse; and with the misdemeanors of theft by unlawful taking or disposition, receiving stolen property, indecent assault, recklessly endangering another person, terroristic threats, unlawful restraint, and indecent exposure. In addition, No. 140 of 1981 charged Burkett with corruption of minors, a misdemeanor. The parties have treated 140/141 as a single case, and we shall also.

2. Information No. 161 of 1981, filed April 7, 1981, charged Burkett with the felonies of rape, involuntary deviate sexual intercourse, and aggravated assault; and with the misdemeanors of unlawful restraint, indecent exposure, terroristic threats, recklessly endangering another person, and indecent assault.

In 140/141, Burkett was convicted on November 17, 1981 of some charges[3] and acquitted of others;[4] a mistrial was declared on the remaining counts when the jury hung.[5] On November 20, 1981, both sides consented to a continuance in 161. On January 20, 1982 Burkett was convicted in 161 on all counts.

Having filed timely post-verdict motions concerning both trials, Burkett was released on bail pending sentencing on February 24, 1982. After 48 days, on April 13, 1982, he was rearrested and charged with the crimes later detailed in criminal action No. 284 of 1982 ("284").[6] Burkett has been continuously incarcerated since this arrest.

On August 19, 1982 the court ordered the district attorney to show cause why transcripts of Burkett's trials should not be furnished to him at the court's expense. The record reflects no subsequent hearing or order on the matter. It appears that only transcripts for 161 were prepared at that time.

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3. The jury convicted Burkett of both counts of burglary, theft by unlawful taking, receiving stolen property, and terroristic threats. It also convicted him of corruption of minors.

4. The jury acquitted Burkett of both counts of indecent assault and indecent exposure. It also acquitted him of involuntary deviate sexual intercourse in No. 141 of 1981. The record does not reveal the disposition of the latter count in No. 140 of 1981.

5. The jury hung as to both counts of rape, recklessly endangering, and unlawful restraint.

6. Information No. 284 of 1982, filed June 18, 1982, charged Burkett with the felonies of burglary and attempted rape; with the misdemeanors of recklessly endangering another person, terroristic threats, and simple assault; and with the summary offense of harassment.

In 284, the prosecution requested and received several Rule 1100 continuances, beginning on October 1, 1982. Burkett filed motions to dismiss for lack of timely prosecution beginning on October 15, 1982. The court denied dismissal and granted further continuances on November 5 and December 29, 1982 and January 4, 1983. On January 28, 1983 Burkett was convicted of all felony and misdemeanor counts by a jury and on January 31, 1983 the court found him guilty of the charged summary offense. Burkett filed timely post-verdict motions.

At least by July 1983, Burkett was requesting trial transcripts of 140/141 and 284. App. 183. Transcripts for 284 were completed and filed in August 1983. The other transcripts were not prepared. No briefing or hearing was scheduled on Burkett's post-verdict motions in any of his cases, and under Pennsylvania law he could not be sentenced until the court had ruled on those motions.[7]

On March 12, 1984, Burkett filed a petition for a writ of habeas corpus with the Blair County Court of Common Pleas, challenging his custody in all three cases on the basis of speedy trial and due process violations and because he had still not been sentenced. A hearing on this petition was held in October 1984, after which a briefing schedule was set for 161 and 284. When no ruling was forthcoming on the habeas petition, Burkett filed for relief on similar grounds in the Pennsylvania Superior Court on December 12, 1984.[8] Burkett's brief in 284 was filed on January 23, 1985.

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7. *See* Commonwealth v. Hill, 282 Pa. Super. 462, 422 A.2d 1385, 1387 (1980); Pa. R. Crim. P. 1123 comment.

8. Relief was ultimately denied by the Superior Court on August 28, 1985 and by the Pennsylvania Supreme Court on April 24, 1986.

Meanwhile, Burkett had also sought to raise the issue of counsel's ineffectiveness in order to preserve that issue for appeal.[9] He objected to proceeding with a hearing on his post-verdict motions in 284 on January 23, 1985, because his motion concerning ineffectiveness in that action, filed September 6, 1984, had yet to be resolved. The hearing was adjourned, and an ineffectiveness hearing was later scheduled for April 1, 1985. As of March 1985, Burkett's post-verdict motions in 161 and 284 had been briefed but not argued, and no briefing had been scheduled in 140/141 because no transcripts had been filed, even though Burkett had filed yet another motion to compel production of those transcripts on January 14, 1985.

B. *Federal Courts: Round I*

On March 28, 1985 Burkett filed a petition for writ of habeas corpus at W.D. Pa. Civ. No. 85-769, charging that the delay in sentencing in all of his cases violated his rights under the Speedy Trial clause. *See* App. at 154; Supp. App. at 3. We also construe the petition to allege a due process violation. The magistrate granted *in forma pauperis* status and ordered an answer on March 29, 1985. Blair County filed a timely answer, to which Burkett filed a response.

The magistrate filed a report and recommendation on May 15, 1985. Finding exhaustion excused because of inordinate delay, he discussed whether Burkett had established a speedy trial violation under the four-part test of *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The magistrate, finding lengthy delay, noted Burkett's repeated requests to be sentenced and attributed no delay to him. The magistrate found prejudice -- that the

9. Motions concerning counsel's ineffectiveness were filed in 140/141 on July 11 and December 2, 1984 (never ruled on); in 161 on July 11 and August 14, 1984 (never ruled on); and in 284 on July 11 and September 6, 1984 (ultimately denied April 2, 1985).

delay had "caused some loss to the petitioner," *see infra* at 35 n.36 -- and that "it would appear to be a fundamental denial of the constitutionally assured right to a speedy trial to delay ruling on post-trial motions far in excess of three years." Supp. App. 11. He reasoned, however, that "it would appear appropriate to withhold any action," *id.* at 12, based apparently on an order of the Blair County Court of Common Pleas that a hearing on post-trial motions in 284 be scheduled "for the earliest possible date consistent with the calendar of this Court." The magistrate therefore recommended with respect to all of Burkett's cases that the writ be denied "unless the Court of Common Pleas fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60) days." Supp. App. 12.

The district court granted the parties ten days for the filing of objections to the report and recommendation of the magistrate, but no objections were filed and no extensions of time were sought. The district court adopted the magistrate's report and recommendation in full as its opinion on May 30, 1985, declaring that the Constitution permitted Blair County 60 further days from that date in which to sentence Burkett.[10] App. 154. Blair County did not

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10. The district court's order reads:

> It is ordered that the petition of Wayne Burkett for a writ of habeas corpus is dismissed and that a certificate of probable cause is denied, unless the Court of Common Pleas of Blair County fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60) days.
>
> It is further ordered that in the event that the Court fails to act in accordance with this directive that the petitioner file a new petition, that jurisdiction on the merits be assumed by this Court and that an appropriate merits determination be made.

appeal, but Burkett did. We denied Burkett a certificate of probable cause to appeal on August 14, 1985, "without prejudice to filing a new petition in the district court." App. 155.

C. *State Courts: Round II*

The Blair County court denied Burkett's state habeas petition (first filed March 12, 1984 as to all three convictions) on June 6, 1985. Having already denied his ineffectiveness motion in 284 on April 2, 1985,[11] the court proceeded to deny his post-verdict motions on May 8 and to sentence him on June 24, 1985. Burkett received consecutive sentences totaling 16 to 32 years, which according to the court was the maximum permitted under law.[12] The court filed an opinion with the sentencing order. Burkett's appeal was docketed in Superior Court at No. 974 Pgh 85.

In 161, post-verdict motions were denied on June 7, 1985. Burkett was sentenced on July 10, 1985, although the sentencing order was not filed until September 18, 1985. As a repeat offender, he received consecutive sentences totalling 22 to 44 years.[13]

We find the language of this order far from pellucid. Given the findings of the magistrate and the district court, however, we read the order as a conditional grant of Burkett's writ. As we read the order, the new "petition" it contemplated was only a petition for enforcement. *See infra* at 34-35 n.35.

11. *See supra* at 7 n.9. Burkett's interlocutory appeal of this denial was quashed by the Superior Court on May 23, 1985.

12. Burkett received 10 to 20 years for burglary, 5 to 10 for attempted rape, and 1 to 2 years for recklessly endangering, consecutive to each other; plus fines totaling $300 and costs. The other offenses merged for sentencing purposes. No credit was given for time served.

13. Burkett received 8 to 16 years for rape, 8 to 16 for involuntary deviate sexual intercourse, 4 to 8 for aggravated assault, and 2 to 4 for terroristic threats, all consecutive to each other; plus fines totalling $800 and costs. The other offenses merged for sentencing purposes. The sentence was to commence as

Burkett's appeal was docketed in Superior Court at No. 1089 Pgh 85. However, no opinion on post-verdict motions or sentencing was then filed,[14] without which filing the record could not be transmitted to Superior Court[15] and the appeal could not proceed.[16]

In 140/141, the court attempted to compel the court reporter to produce the transcripts by entering orders on May 7, 1985 ("forthwith") and on August 21, 1985 ("on or before . . . August 30"). Despite the continuing lack of transcripts, post-verdict motions were heard on August 21, 1985. Despite the hearing, the court has yet to either rule on the motions or sentence Burkett.

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of July 10, 1985, with credit given for jail time from February 13, 1981, to February 24, 1982. App. 49-52.

14. Pennsylvania Rule of Appellate Procedure 1925(a) provides as follows:

> Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

15. "When the record is complete for purposes of the appeal, the clerk of the lower court shall transmit it to the prothonotary of the appellate court." Pa. R. App. P. 1931(c).

16. Pennsylvania Rule of Appellate Procedure 2185(a) provides that an appellant's brief shall be due 40 days after the record is transmitted. Rule 1931(a) provides that the lower court clerk shall transmit the record within 40 days of the filing of the notice of appeal (here August 13, 1985). Rule 1931(b) gives the trial judge the original duty of ensuring that the record is completed and transmitted. Rule 1935 also gives, in succession, the appellate court prothonotary, the state Court Administrator, and the state Supreme Court the authority to deal with delinquency by the lower court.

D. *The Instant Habeas Petitions*

Burkett filed the two instant habeas petitions on August 27, 1985. Civ. No. 85-1966 (referred to hereinafter as "No. 86-3074," its docket number on appeal) sought release for the delay in 284 and also claimed that the federal court's May 30, 1985 order giving the Blair County court 60 days to sentence him had exposed him to a severe retaliatory sentence. Civ. No. 85-1965 ("No. 86-3121" on appeal) asserted similar claims concerning both 140/141 and 161.

In No. 86-3074, by orders dated September 19 and 20, 1985, the magistrate ordered a supplemental answer, appointed counsel for Burkett, and set an evidentiary hearing that was eventually held December 23, 1985. On December 24, 1985 the magistrate recommended dismissal for want of exhaustion. After timely objections by Burkett, the district court adopted the magistrate's report as its opinion on January 15, 1986. Burkett filed a timely appeal.

The magistrate's report, adopted as the court's opinion, noted the "considerable delay" in the Blair County court. Based on respondent's statements at the hearing, however, the magistrate found that "the matter has finally been disposed of by [Blair County], and the complete record has been transmitted to the Superior Court where in the course of normal appellate procedure, the merits of the petition, including the issue of delay can be addressed." App. 134.[17]

In No. 86-3121, the magistrate filed a report on September 23, 1985 without holding an evidentiary hearing. He recommended dismissal for want of

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17. Blair County counsel represented on September 26 and December 23, 1985 that the trial record (due September 1, 1985) was being transmitted to Superior Court. App. 127-28, 204. The Superior Court received the record, without which the appeal could not proceed, on January 2, 1986.

exhaustion on the basis that "the matter has finally been disposed of by [Blair County] and is presently the subject of an appeal to the Pennsylvania Superior Court where in the course of normal appellate procedure the merits of the petition, including the issue of delay can be addressed." App. 56. Burkett timely objected that he had not been sentenced in 140/141 and that his appeal in 161 could not proceed because Blair County had not transmitted the record (due September 23, 1985) to the Superior Court.[18] The district court adopted the magistrate's report and recommendation on October 15, 1985

Burkett was transferred to different prisons three times between September and November 1985. Each time he promptly notified the district court of his new address. The court sent the magistrate's report in No. 86-3121 by certified mail to his correct address on September 23, 1985; it also sent communications to his correct address on October 4, October 9, October 11, and November 12, 1985, each of which assured him that "you will be advised of any decision." However, the critical final order in No. 86-3121, which was filed by the court on October 15, was sent by uncertified mail to the wrong prison; Burkett did not receive it nor did he learn of it until the December 23, 1985 hearing in No. 86-3074, despite an inquiry by mail on December 16. *See* App. 75, 175-176. On January 15 and 21, 1986, Burkett moved for reconsideration on two grounds: (1) that he had not been notified of the October 15 order, and (2) that the court had not considered his 140/141 convictions or the continuing delay in his 161 appeal. On January 17, the district court vacated its October 15 order on only the former ground; it then redenied Burkett's petition for habeas corpus on January 17 and 23, 1986.

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18. *See supra* at 10-11 & nn. 14-16.

Burkett filed a notice of appeal from both January orders on February 5, 1986. This Court granted a certificate of probable cause in both appeals on October 21, 1986. Oral argument was heard April 10, 1987.

E. *State Courts: Round III*

On the day after the instant federal habeas petitions were docketed in the district court, the Pennsylvania Superior Court denied state habeas relief based on delay in all of Burkett's cases. Burkett then took his state habeas claims to the Pennsylvania Supreme Court on September 27, 1985, which eventually denied relief on April 24, 1986.

In the direct appeal on 284, the record was transmitted to Superior Court on January 2, 1986, four months late. So that he could raise his old counsel's ineffectiveness in his direct appeal, Burkett renewed the request for new counsel that had been denied by the Blair County court. The Superior Court granted the request on April 4, 1986, remanding the case to Blair County for 30 days in which time new counsel could be appointed. After appointing new counsel on April 9, 1986, Blair County did not return the record until July 16, 1986. The appeal then appears to have proceeded normally. The Superior Court denied the appeal on January 12, 1987 and denied rehearing on February 26, 1987. Burkett's timely petition for allocatur is pending before the Pennsylvania Supreme Court.

In 161, Burkett's sentencing order was filed on September 18, 1985, and the record was due in the Superior Court on September 22, 1985. However, no opinion on post-verdict motions was filed until May 8, 1987 -- a month after oral argument in this Court and as the opinion writer was completing the final draft of this opinion for circulation to the other members of the panel. Blair County has not indicated whether a

sentencing opinion remains to be filed or whether the record has now been transmitted to the Superior Court.[19] The Superior Court ordered Blair County to appoint new counsel for Burkett on April 3, 1986, and it did so on April 9, 1986.

In 140/141, the first trial transcript was filed on October 22, 1985, but the final transcript was not complete until August 11, 1986. The court scheduled new hearings on post-verdict motions but has not yet held such a hearing. Shortly before oral argument in this case, the latest scheduled hearing had to be postponed again. Blair County had assigned to hear the case a judge who had been a member of the district attorney's office during the pendency of Burkett's post-verdict motions, and Burkett successfully moved to recuse the judge. At oral argument counsel indicated that the motions were currently scheduled for hearing on May 21, 1987.

Burkett also filed a new habeas petition in the Blair County court on December 22, 1986, challenging the court's continued failure to hear post-verdict motions or sentence him in 140/141. The court denied the writ on June 2, 1987. The record does not reveal if Burkett has appealed the denial.

II. *APPELLATE JURISDICTION IN NO. 86-3121: EXTENDING TIME FOR APPEAL UNDER RULE 60(b)*

Because Burkett filed no appeal as such from the October 15, 1985 final order denying the writ in No.

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19. *See supra* at 10-11 & nn. 14-16. Burkett filed suit in federal court under 42 U.S.C. § 1983 on February 10, 1985, based on the prothonotary's failure to transmit the records in 161 and 284. The district court dismissed Burkett's claim concerning only 161 on December 10, 1986 in W.D. Pa. Civ. No. 86-313, and we were forced to dismiss Burkett's interlocutory appeal for lack of jurisdiction on February 25, 1987 in 3d Cir. No. 86-3785.

86-3121, we raise *sua sponte* the issue of our jurisdiction over that case.[20] Burkett did file motions denominated as motions for reconsideration on January 15 and 21, 1986. The district court treated these as a motion for relief from its October 15 order, *see* Fed. R. Civ. P. 60(b), granted the motion, and redenied the habeas corpus petition on January 17 and 23. Burkett then filed a notice of appeal on February 5, 1986. If the district court had the power to construe the motions as it did in order to allow Burkett to file a timely notice of appeal, we have jurisdiction under 28 U.S.C. § 1291 to review the reentered final order.[21] If the district court's construction was in error, however, we lack jurisdiction: Burkett's motions could only be construed as either untimely motions for reconsideration under Federal Rule of Civil Procedure 59(e), whose filing deadline in this case would have been October 29, 1985; untimely notices of appeal under Federal Rule of Appellate Procedure 4(a)(1), with a filing deadline of November 14, 1985; or untimely motions to extend time to appeal under Federal Rule of Appellate Procedure 4(a)(5), due December 16, 1985.

We begin our analysis with the case of *West v. Keve*, 721 F.2d 91 (3d Cir. 1983). In *West*, we confronted an appellant who had filed a Rule 60(b) motion whose "sole stated purpose . . . [was] to extend the time for appeal." *Id.* at 96. Carefully limiting our decision to those specific facts, we held that a district court could entertain such a motion only if the motion

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20. "[T]he requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (citation omitted).

21. Respondents have not raised the question whether the district court abused its discretion in reentering its final order, so we need not address that issue. *See* Felshina v. Schweiker, 707 F.2d 71, 72 (2d Cir. 1983).

and subsequent notice of appeal met the time constraints of Rule 4(a)(5). *Id.* at 97.[22]

In *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3d Cir. 1985), we applied *West* to bar relief through a Rule 60(b) motion to a party whose counsel had not been notified by the court of the entry of a final order. We reached this result, even though counsel for neither side had been notified, *id.* at 46, on the basis of Federal Rule of Civil Procedure 77(d), which states that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a)." *Id.* at 43. Noting counsel's lack of diligence, however, we expressly declined to decide whether relief might be permitted under Rule 60(b) "when delay in filing an appeal is based on reliance on some affirmative behavior of the district court." *Id.* at 45.[23]

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22. Regardless of our holding in *West*, at least six Courts of Appeals have allowed relief under Rule 60(b) outside the time constraints under Rule 4(a)(5). *See, e.g.*, Harnish v. Manatee County, Fla., 783 F.2d 1535, 1537-38 (11th Cir. 1986); Wallace v. McManus, 776 F.2d 915, 917 (10th Cir. 1985) (*pro se* litigant); Rodgers v. Watt, 722 F.2d 456, 459-460 (9th Cir. 1983) (en banc); *Felshina*, 707 F.2d at 72; Buckeye Cellulose Corp. v. Braggs Elec. Const. Co., 569 F.2d 1036, 1037-38 (8th Cir. 1978); Fidelity & Deposit Co. v. USAFORM Hail Pool, Inc., 523 F.2d 744, 747-51 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *see also* Sames v. Gable, 732 F.2d 49, 51 n.2 (3d Cir. 1984) (distinguishing *West* on basis of "special circumstance").

23. While not holding so explicitly, at least four Courts of Appeals in addition to this court in *Hall* have at least assumed *arguendo* that such relief might be granted. *See, e.g.*, Spika v. Village of Lombard, Ill., 763 F.2d 282, 285 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 79 (1986); Case v. BASF Wyandotte, 737 F.2d 1034, 1035 (Fed. Cir.) (*pro se* litigant), *cert. denied*, 469 U.S. 982 (1984); Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 227 (4th Cir. 1981); Scola v. Boat Frances R., Inc., 618 F.2d 147, 152 (1st Cir. 1980). *See also* James v. United States, 459 U.S. 1044, 1046 (1982) (opinion of Brennan, J., respecting denial of certiorari).

The instant case is distinguishable from both *West* and *West*'s application in *Hall*. The purpose of Burkett's motion was different from that under consideration in *West*. Because Burkett's motion for reconsideration was motivated not only by his need for more time in which to appeal, but also by the court's failure to consider his 140/141 convictions and the continuing delay in his 161 appeal, the motion's "sole stated purpose" was not "to extend the time for appeal." *West*, 721 F.2d at 96. We similarly believe that the facts of this case are significantly different from those in *Hall*, which dealt with the actions of an attorney who was not diligent. Burkett was not only acting *pro se* but was incarcerated, physically restrained by respondents from checking in person on the status of his case. *Cf. Fallen v. United States*, 378 U.S. 139, 142-143 (1964) (court must accept notice of appeal filed late by prisoner because prison prevented its timely filing). He was exceptionally diligent in notifying the court of three address changes and responding to court orders, and the clerk had sent the magistrate's order to the correct address by certified mail. Most importantly, the clerk wrote Burkett four times in October and November 1985 -- thus both before and after the entry of final judgment in No. 86-3121 -- and assured him that he would be "advised of any decision." Only the critical final order was sent to the wrong address. The current situation therefore parallels those from which *Hall* explicitly distinguished itself: "In these and other cases, the 60(b) motions were allowed because counsel's duty of diligence was suspended in reliance on some affirmative action of the district court." 775 F.2d at 45 (citing cases).[24]

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24. Indeed, Burkett's reliance appears to have been reasonable because No. 86-3074, his other federal habeas petition, was docketed simultaneously and was in fact still pending without final resolution.

We reaffirm *West* and *Hall* and do not extend ourselves to distinguish them, but this case presents exceptional circumstances that justify relief under Rule 60(b) outside the time constraints of Rule 4(a)(5). We emphasize that Burkett was a diligent,[25] incarcerated habeas petitioner,[26] repeatedly transferred from jail to jail; that affirmative behavior of the court induced him to await notification by the court for a reasonable length of time; [27] that he learned of the entry of judgment too late to apply for relief under Rule 4(a)(5); that he promptly sought relief under Rule 60(b) within 30 days of learning of the entry of judgment; and that respondents have shown no prejudice.[28].

For the foregoing reasons the district court had the power under Rule 60(b)[29] to vacate and reenter

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25. In addition to Burkett's prompt notification of all address changes, we note that he wrote the court on December 16, 1985 -- the day the Rule 4(a)(5) limit expired -- to inquire whether an order had been entered.

26. We note too that an order in a habeas corpus case is never strictly *res judicata*. A successive petition alleging the identical grounds may be entertained unless "the judge of court is satisfied that the ends of justice will not be served by such inquiry." 28 U.S.C. § 2244(a); *see* Sanders v. United States, 373 U.S. 1, 15 (1963). Barring Rule 60(b) relief here would thus serve only delay, not finality.

27. Burkett's December 16 letter was written only 34 days after the court had last assured him that he would be notified of any decision.

28. *Cf.* United States v. Hashagen, No. 86-5145 (3d Cir. Apr. 23, 1987) (in banc) (allowing premature criminal appeal in absence of prejudice); Richerson v. Jones, 557 F.2d 918, 922 (3d Cir. 1977) (allowing premature civil appeal in absence of prejudice).

29. We need not, and do not, decide whether this relief should come under the rubric of Rule 60(b)(2) (where due diligence did not lead to timely discovery of the order); 60(b)(5) (where "it is no longer equitable that the judgment should have prospective application");

judgment. Because Burkett then filed a notice of appeal within 30 days of reentry, we have jurisdiction to review the merits of the order under 28 U.S.C. § 1291.

III. *EXHAUSTION OF STATE REMEDIES*

A state prisoner seeking federal habeas relief must first exhaust "the remedies available in the courts of the State" unless "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b). As we have noted previously, however, "[i]t is the legal issues that are to be exhausted, not the petitioner." *U.S. ex rel. Geisler v. Walters*, 510 F.2d 887, 893 (3d Cir. 1975) (quoting *Park v. Thompson*, 356 F. Supp. 783, 788 (D. Haw. 1973)). To that end, "inexcusable or inordinate delay by the state in processing claims for relief may render the state remedy . . . ineffective to protect the rights of the prisoner," excusing a lack of exhaustion. *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986).

In general, the burden rests on a habeas petitioner to prove all facts warranting relief, *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982), including the facts relevant to the exhaustion requirement, *Gonce v. Redman*, 780 F.2d 333, 336 (3d Cir. 1985). However, where a petitioner has demonstrated inordinate delay, we have placed the burden on respondents to demonstrate why further resort to the state courts should be required. *See Wojtczak*, 800 F.2d at 355-56; *Codispoti v. Howard*, 589 F.2d 135, 142 (3d Cir. 1978).

The district court that entertained Burkett's earlier habeas petition found that the delay as of May

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or 60(b)(6) ("any other reason justifying relief"). *See Sames*, 732 F.2d at 51 n.2.

1985 was already sufficient to excuse exhaustion. That quite correct finding was part of an order which was not appealed by the state, and we did not grant Burkett's probable cause petition; the district court's ruling is therefore not open to collateral attack in this proceeding. Hence, Burkett's claims would only have become unexhausted if state proceedings have progressed to a sufficient degree.

As to No. 86-3074, Burkett's direct appeal in 284 now appears to be proceeding normally.[30] Blair County has thus complied with the previous court order as to 284. Burkett has alleged that Blair County had further delayed his appeal by transmitting the record four months late, and he alleges a further three-month delay since the district court's decision. However, it is not disputed that the case is now before the Pennsylvania Supreme Court. Under the circumstances, we believe that it is appropriate to allow that court, in the first instance, to hear petitioner's claims. We will therefore affirm the district court's dismissal for lack of exhaustion in No. 86-3074.

In No. 86-3121, there has been insufficient change for us to find that Burkett's claims have since become unexhausted. There is no indication that the Pennsylvania appellate courts will soon receive 140/141 or that they will soon dispose of 161, even if we were again inclined to give the state yet more time. Because of the continued delay, we find that Burkett has exhausted his state remedies in this proceeding.[31]

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30. The magistrate's finding in this respect was premature. *See supra* at 12-13 & n.17.

31. Even if Burkett's appeal can now proceed in 161, we believe Burkett has waited long enough for the state court system to act and may properly seek relief in federal court. *See Wojtczak*, 800 F.2d at 356 n.3 (finding that delay of three and one-half years in ruling on PCHA petition excused exhaustion even where cause of delay may now have been removed).

We repeat that "justice delayed is justice denied." *Geisler*, 510 F.2d at 893. We fully appreciate the requirements of comity, but further deference to the state courts in No. 86-3121 would constitute a comity of errors, making a mockery of fundamental rights that are guaranteed to the guilty and innocent alike. Hence we hold that the egregious ongoing delay in 140/141 and 161 itself, amounting to five and one-half years, as a matter of law excuses exhaustion of state remedies concerning all federal claims raised by Burkett in 86-3121. *See Wojtczak*, 800 F.2d at 354. Because the district court erred as a matter of law in finding that Burkett failed to exhaust, its order on that issue must be reversed.[32]

IV. *CONSTITUTIONAL PROTECTIONS AGAINST DELAY: SPEEDY TRIAL AND DUE PROCESS CONCERNS*

Having found both that we have jurisdiction over No. 86-3121 because a timely notice of appeal has been filed and that state remedies have been sufficiently exhausted, we now consider the merits of the legal

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32. We note also that even were we to find the claims concerning 161 unexhausted, relief would not be barred on the 140/141 claims, since they arise from a wholly separate conviction. The "total exhaustion" rule of Rose v. Lundy, 455 U.S. 509, 522 (1982), applies only to claims arising from a single criminal case. Nor is exhaustion required in any event when a petitioner in essence seeks review of a state's failure to comply with a federal court's mandate. Tully v. Scheu, 637 F.2d 917, 921 (3d Cir. 1980). We hold that this is the case here.

We regard as frivolous Blair County's assertion that Burkett's recent filing of a new state habeas petition in its court constitutes his implicit admission "that he has not exhausted his state remedies nor are attempts futile, and as a consequence, the Federal action is moot." Brief for Appellees at 8.

issues presented in that habeas corpus petition. [33] Burkett's petition arises at the intersection of two lines of cases. In one line, the Sixth Amend ment guarantees the right to a speedy trial, which applies to the states by the Fourteenth Amendment. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967). In the second line, the Due Process clause of the Fourteenth Amendment has guaranteed to state criminal defendants procedural safeguards not only at the trial level, but also for appeals as of right. *See Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985); *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956). We first review the applicable law in both lines to determine if either or both apply and, if so, what relief they may provide. As is explained more fully below, we find both lines applicable. We will therefore apply their analysis to Burkett's petitions to the extent that the record reveals no material issues of fact.

A. *The Right to Speedy Trial*

The Sixth Amendment right to a speedy trial is a fundamental tenet of Anglo-American jurisprudence. The liberties now embodied therein were first articulated in the very foundation of our English law heritage. *See* Magna Carta, c. 29 [c. 40 of King John's Charter of 1215; c. 29 of King Edward's Charter of 1297] (1225) ("To none will we sell, to none will we deny or delay, right or justice"). The Speedy Trial clause is applicable to state trials as part of the due process required by the Fourteenth Amendment. *Klopfer*, 386 U.S. at 226.

In determining whether the right has been violated, a court should weigh four factors: "Length of

33. In view of the age of the cases encompassed by No. 86-3121, we feel obliged to at least consider the merits of the legal issues rather than automatically remand to the district court for that purpose. *See infra* at 42-43.

delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Sandler v. Sullivan*, 748 F.2d 820 (3d Cir. 1984). Because "the right to a speedy trial is a more vague concept than other procedural rights," *Barker*, 407 U.S. at 521, courts are compelled to "approach speedy trial cases on an *ad hoc* basis," *id.* at 530. Whether a particular individual's rights have been violated "depends upon the circumstances," *Pollard*, 352 U.S. at 361, and therefore upon "a functional analysis of the right in the particular context of the case." *Barker*, 407 U.S. at 522. Hence the *Barker* analysis presents four factors that "are guidelines, not rigid tests," *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986), and no single factor is "either a necessary or sufficient condition of the deprivation of a right to a speedy trial." *Barker*, 407 U.S. at 533.

If this analysis leads to a conclusion that the right to a speedy trial has been violated, the prejudice of the violation must be rectified. *See, e.g., Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 486 (1973). Where the prejudice cannot be rectified, the remedy must be discharge from custody with prejudice to retrial. *See Strunk v. United States*, 412 U.S. 434, 440 (1973).

Although neither the Supreme Court nor this Court has definitively held that the right to speedy trial applies to post-verdict proceedings, both have assumed *arguendo* that the right extends at least to sentencing. *See, e.g., Pollard v. United States*, 352 U.S. 354, 361 (1957); *United States v. Campisi*, 583 F.2d 692, 694 (3d Cir. 1978); *see also Schandelmeier v. Cunningham*, No. 86-3251, slip op. at 9 (3d Cir. Dec. 2, 1986) (dismissing without prejudice, for want of exhaustion, a speedy trial claim in post-verdict context). Other courts -- including the district court in

Burkett's earlier habeas action, *see* Supp. App. 7 -- have squarely held that the Speedy Trial clause applies to the sentencing phase of prosecution. *Tinghitella v. State of California*, 718 F.2d 308, 312-13 (9th Cir. 1983); *United States v. Merrival*, 600 F.2d 717, 720 (8th Cir. 1979); *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978); *United States v. Reese*, 568 F.2d 1246, 1253 (6th Cir. 1977); *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976), *cert. denied*, 434 U.S. 851 (1977); *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (prisoner discharged for 31-month delay); *Hooper v. Cunningham*, Civ. No. 84-2818, slip. op. at 4, 9 (W.D. Pa. Feb. 21, 1985) (Blair County prisoner unsentenced for 37 months after trial must be discharged from custody), *motion to withdraw appeal granted*, No. 85-3161 (3d Cir. Sept. 18, 1985).[34] Indeed, the Tenth Circuit noted in *Perez* that, since the Supreme Court's decision in *Pollard*, it "and all others which have addressed the issue have either treated the subject as established law or have perpetuated the Court's assumption in *Pollard*." 793 F.2d at 253 (citing cases).

We now make explicit what we have assumed in our previous cases, that the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged, *United States v. Marion*, 404 U.S. 307, 320 (1971), up through the sentencing phase of prosecution, *see Camplisi*, 583 F.2d at 694 -- in other words, until one final, pre-appellate determination has been made as to whether and for how long the accused should be incarcerated.

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34. *See also* United States v. Tortorello, 391 F.2d 587, 589 (2d Cir. 1968) (assuming *arguendo* that Speedy Trial Clause applies to sentencing); Brady v. Superintendent, Anne Arundel Co. Det. Ctr., 443 F.2d 1307, 1310 (4th Cir. 1971) (same); Commonwealth v. Pounds, 490 Pa. 621, 417 A.2d 597, 599 (1980) (same).

In *Campisi*, without deciding this last proposition, we applied the four-part *Barker* test to speedy trial claims concerning delays in sentencing. *Campisi*, 583 F.2d at 694. Other courts have done the same. *See, e.g., Campbell*, 531 F.2d at 1335; *Pounds*, 417 A.2d at 599-601; *see also Perez*, 793 F.2d at 254 (deciding definitively that the Speedy Trial clause applies to post-verdict proceedings); *Reese*, 568 F.2d at 1253 (same). We hold that the proper test to determine a Speedy Trial clause violation in a post-verdict context is the four-factor test of *Barker v. Wingo*, 407 U.S. at 530. Moreover, we agree with the prevailing caselaw that none of the *Barker* factors is either necessary or sufficient. Nevertheless, while "all four factors are to be balanced in light of the facts and circumstances of the case," *Perez*, 793 F.2d at 254 (citations omitted), "once a defendant has been convicted it would be the rarest of circumstances in which the right to a speedy trial could be infringed without a showing of prejudice," *Id.* at 256. Additionally, we agree that *Strunk* is also applicable in the sentencing context and, if a violation is found, the remedy must be discharge with prejudice to retrial if no lesser remedy can rectify the prejudice to the defendant. 412 U.S. at 440.

B. *Due Process*

The Supreme Court has found that the Due Process clause protects the right to direct appeal when that right is guaranteed by the state, even though the Constitution does not require states to grant that right. *See, e.g., Evitts*, 469 U.S. at 393. Due process requires that a right to appeal be a right to an "'adequate and effective' appeal" which is "more than a 'meaningless ritual.'" *Id.* at 393, 394 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), and *Douglas v. California*, 372 U.S. 353, 358 (1963)). Due process further protects not only the right "to obtain a

favorable decision," but also the right "to obtain a decision at all . . . on the merits of the case." *Evitts*, 469 U.S. at 395 n.6 (emphasis in original). In short a convicted defendant has a right to know what the sentence is to be, and to proceed with a direct appeal.

The Court has been clear in its reasons for extending the meaningful procedural protections of due process to appeals as of right. By deciding that an appeal is so important that it must be available as a matter of right, a state has "made the appeal the final step in the adjudication of guilt or innocence of the individual." *Id.* at 404 (citing *Griffin*, 351 U.S. at 18). The state itself recognizes that an appeal as of right plays such a crucial role that "the State could not . . . decide[] the appeal . . . arbitrarily" or otherwise deny an appellant "fair procedure." *Evitts*, 469 U.S. at 404.

We have held that inordinate and unexcused delays in post-trial or post-conviction proceedings may violate a convict's "constitutional rights." *Codispoti*, 589 F.2d at 142. Several other courts of appeals have identified the source of these rights as the Due Process clause. *See, e.g., Lowe v. Letzinger*, 772 F.2d 308, 312 (7th Cir. 1985); *DeLancy v. Caldwell*, 741 F.2d 1246, 1247-48 (10th Cir. 1984); *United States v. Pratt*, 645 F.2d 89, 91 (1st Cir.), *cert. denied*, 454 U.S. 881 (1981); *Rheuark v. Shaw*, 628 F.2d 297, 302-04 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *McLallen v. Henderson*, 492 F.2d 1298, 1299-1300 (8th Cir. 1974); *Rivera v. Concepcion*, 469 F.2d 17, 19 (1st Cir. 1972); *Way v. Crouse*, 421 F.2d 145, 146-47 (10th Cir. 1970); *see also U.S. ex rel. Hankins v. Wicker*, 582 F. Supp. 180, 185 (W.D. Pa. 1984), *aff'd mem.*, 782 F.2d 1028 (3d Cir.), *cert. denied*, 107 S.Ct. 118 (1986); *Mitchell v. Zimmerman*, 582 F. Supp. 186, 187-88 (E.D. Pa. 1984). Delays such as those attendant to Burkett's convictions may therefore violate the strictures of due process.

The Due Process clause thus protects not only against delays in trial, including sentencing; it also guarantees a reasonably speedy appeal if the state has chosen to give defendants the right to "attempt[] to demonstrate that the conviction, and the consequent drastic loss of liberty, is unlawful." *Evitts*, 469 U.S. at 396. Where post-verdict delays not only impede sentencing but also the appeal as of right, the clause is doubly implicated. "Due process can be denied by any substantial retardation of the appellate process." *Rheuark*, 628 F.2d at 302 (citing cases); *see also DeLancy*, 741 F.2d at 1247 (same).

"[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim." *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Moreover, state actions must be "fundamentally unfair," not merely undesirable, in order to violate due process. *See, e.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). "However, . . . not every delay in the appeal of a case, even an inordinate one, violates due process." *Rheuark*, 628 F.2d at 303. The existence of a due process violation must thus be left to an *ad hoc* determination.

Because both the Due Process and Speedy Trial clauses constrain post-verdict delay, the Fifth Circuit and the Tenth Circuit have looked to the four *Barker* factors as a means of determining whether due process has been violated. *See DeLancy*, 741 F.2d at 1247-48 (reviewing delays occasioned in securing appeal); *Rheuark*, 628 F.2d at 302-04 (same). Because of both the delay in sentencing and the gatekeeping role played by sentencing in connection with Pennsylvania appeals, we too face the same situation in Burkett's cases. We agree that, as a general matter, the *Barker* factors should also inform our due process determination, for "the right to avoid unreasonable delay in the appellate process is similar to the right to a speedy trial." *DeLancy*, 741 F.2d at 1247.

However, the *Barker* prejudice factor does not run fully concurrently when examining delays in sentencing and delays in initiating appellate review. *Compare Smith v. Hooey*, 393 U.S. 374, 378-80 (1969), *with Rheuark*, 628 F.2d at 303 n.8. In adapting the prejudice prong of the *Barker* analysis to appellate delays, courts have identified three interests in promoting prompt appeals:

> (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.

Rheuark, 628 F.2d at 303 n.8.

The normal remedy for a due process violation is not discharge; rather, a court faced with a violation should attempt to counteract any resulting prejudice demonstrated by a petitioner. However, discharge is warranted where attempting an alternate remedy would not vitiate the prejudice of the fundamental unfairness or would itself violate a petitioner's constitutional rights. *See, e.g., Codispoti*, 589 F.2d at 142 (district court must decide "whether a new trial should be held or whether due to the passage of time the charges must be dismissed"); *Rheuark*, 628 F.2d at 303 n.8 (if retrial is ordered after substantial delay on appeal, *Barker* applies directly in determining whether the Speedy Trial clause should bar such retrial).

In exceptionally egregious circumstances, a delay itself may "violate[] those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (citations omitted). Once the time that constitutes

the delay has elapsed no remedy can call it back. Where delay is so extreme as to assume constitutional proportions, discharge thus becomes less of an unlikely remedy.

Moreover, discharge is a generally available remedy where lesser remedies prove ineffective in curbing a continuing due process violation. Where a court order has denied discharge on the condition that a lesser remedy be granted, but that order has gone unfulfilled, discharge is indeed appropriate. *See, e.g., Lane v. Brown*, 372 U.S. 477, 485 (1963); *Brady*, 443 F.2d at 1309.

V. *THE MERITS*

We have found that due process and speedy trial claims may lie to rectify egregious delay in sentencing and initiation of appeal. We will therefore examine, in light of the applicable legal principles just discussed, the two state convictions that are encompassed by No. 86-3121, the habeas corpus petition in which Burkett has exhausted his state remedies.

A. *Nos. 140 and 141 of 1981*

Burkett has now been incarcerated for well over six years on 140/141 without a sentence. We analyze Burkett's habeas appeal in light of this delay in sentencing and the resulting delay in Burkett's ~~ability~~ to appeal, as well as the disregard with which the Blair County court has met the previous federal court order denying further relief on the condition that Burkett be sentenced within 60 days -- an order that is now more than two years old.

1. *Speedy Trial Violation*

Under the law of the case, Burkett has established a speedy trial violation. The district court found on May 30, 1985 that his right to speedy trial would be violated unless Blair County resolved all post-verdict motions

and sentenced Burkett within 60 days in all of his cases. The county did not challenge the magistrate's report and recommendation before either the magistrate or the district court, did not attempt to appeal the district court's order, sought no extension of time for complying with the order, has not complied with respect to 140/141, and even now offers no excuse for non-compliance.[35]

As we have noted above, *see supra* at 8-9, both the magistrate and the district court found that all *Barker* factors weighed to some extent in Burkett's favor, including a finding that the delay alone had caused

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35. The partial dissent suggests that Blair County could not have appealed the order. Conc. & Diss. Op., Typescript at 11 n.6. However, we believe that Blair County had standing to appeal. First, it did not, in contrast to the appellant in *Perez v. Ledesma*, 401 U.S. 82, 87 n.3 (1971), fully prevail as to all appealable aspects of the order. The order dismissed Burkett's petition only conditionally -- "unless . . . Blair County fails to . . . impose any appropriate sentence within sixty (60) days" -- and ordered Blair County "to act in accordance with this directive." Second, the district court would have had no constitutional authority to enter such an order had no violation been at least impending. On the other hand, a court must grant appropriate relief where an existing violation is found. Indeed, having found a violation, there was nothing left to be decided in a new petition other than the remedy. Unfortunately, however, the district court, instead of retaining jurisdiction, marked the case "closed." (Obviously the district court did not conceive that the county, once warned, would not sentence Burkett within 60 days). Under these circumstances, we read the less-than-pellucid order, together with the court's opinion, as a conditional grant of Burkett's writ. The "new petition" contemplated by the order must thus have been a petition for enforcement by appropriate remedy, with the fact of violation established if Blair County neither complied nor successfully petitioned for an extension.

As for finality, it may be argued that this Court has already determined that the order was final and appealable by denying without prejudice a certificate of probable cause in Burkett's appeal instead of dismissing for want of appellate jurisdiction. App. 155.

Burkett prejudice.[36] The findings of the magistrate, including that of a speedy trial violation, were adopted and incorporated by the district court; the district court's accompanying order is not now subject to collateral attack. Even if it were, we think that the order was well within the district court's discretion.

The length of delay has grown from three and one-half to five and one-half years. The reason for the additional delay -- crowded court calendars and the court reporter's delay in filing transcripts -- must be weighed against the government rather than Burkett. *See Barker*, 407 U.S. at 514. Burkett has continuously

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36. The magistrate stated:

> As the Court recognized in *Smith v. Hooey*, 393 U.S. 374, 378 (1969), where delay occurs, an individual may lose certain advantages such as receiving concurrent sentences and may even receive an enhanced sentence.
>
> While the extent of prejudice cannot be measured with exactitude, it would appear reasonable to conclude that the delay by the Blair County courts has caused some loss to the petitioner.

Supp. App. at 10-11.

Because the district court found prejudice in the earlier proceedings, this case does not present the question of when, if ever, a court could find a post-verdict speedy trial violation without first finding prejudice. We therefore find that Judge Garth's requirement, with which we do not take issue, that delay alone is insufficient and that a defendant bears the burden of establishing prejudice, *see* Conc. & Diss. Op., Typescript at 6, has thus been satisfied.

We recognize, with Judge Garth, the significance of conviction in assessing prejudice, and cannot disagree with his conclusion that, post-conviction, there is less fear that an individual is being improperly subjected to incarceration. Conc. & Diss. Op., Typescript at 10. However, we stress that the sentencing court or an appellate court may ultimately determine that no incarceration is proper.

asserted his right during this time. Finally, the prejudice to Burkett found by the district court on May 30, 1985 can only have been compounded by the additional two years of delay -- he may have lost at least in part the opportunity for concurrent sentencing,[37] and we would expect any person to suffer some degree of anxiety and concern after not being sentenced after six years of incarceration. This is particularly so where a federal court order designed to remedy the problem has still had no effect after two years.

Even had there been no prior determination concerning Burkett's pre-sentence delay, we are aware of no case where relief under the Sixth Amendment was denied where the pre-sentence delay was as egregious as here. The facts of cases denying relief have all involved significantly less extensive delays. *Campisi*, 583 F.2d at 694-95, *Reese*, 568 F.2d at 1252-53, *Merrival*, 600 F.2d at 720, and *Perez*, 793 F.2d at 252-57, all found delays ranging only from five to 15 months, most of which time (for example, all but 17 days in *Merrival*) was excusable. *Pollard* involved a timely but accidentally invalid sentence promptly corrected upon discovery of its invalidity after almost 24 months, *see* 352 U.S. at 356-57, 361-61; four justices would nonetheless have granted relief even though the petitioner had not requested proper sentencing, *id.* at 368 (Warren, C.J., dissenting). *Pounds* also involved a 24-month delay, about half of which was unexcused, but the appellant neither asserted his right to be sentenced nor showed prejudice. *See* 417 A.2d at 599-601. *Tortorello* involved a largely excused 30-month delay. *See* 391 F.2d at 588-89. *Howard* involved a resentencing three years after a timely sentence had initially been suspended

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37. We note that the courts in 161 and 284 did not give concurrent credit for time already served.

and the petitioner placed on probation; the court refused to prohibit resentencing pursuant to federal statute because the petitioner had not sought to be sentenced until after revocation of probation was threatened. *See* 577 F.2d at 270-72. In *Tinghitella*, the petitioner fled the jurisdiction prior to a timely scheduled sentencing and refused to allow the state's constitutionally permissible (under the circumstances) offer of sentencing *in absentia*. *See* 718 F.2d at 310-13.

For more egregious delays, on the other hand, courts have found that relief was mandated. The petitioner was unconditionally released in *Juarez-Casares* because of an unexcused 31-month delay for which he had shown possible prejudice, even though he had not asserted his right to prompt sentencing. *See* 496 F.2d at 191-93. A six-year delay, during which the petitioner was at liberty for the 51 unexcused months, was condemned in *Campbell*, even though the petitioner had not asserted his right to sentencing; remand was ordered for findings as to prejudice even though his allegations appeared weak. *See* 531 F.2d at 1334-36.

Because of the procedural posture of this case, arising only after a prior court order, we take special note of *Brady*. In *Brady*, the petitioner's death sentence had been vacated, but the state did not resentence him for eight years. Brady himself preferred death to life (the only statutory alternative), but his counsel would not agree to a sentencing proceeding with only those two options, and the prosecution did not proceed without such agreement. The district court "denied relief" only on the condition that Brady be resentenced promptly to life in prison, with full credit for time served since his arrest. The state promptly complied, and the Fourth Circuit declined to order further relief under the circumstances of the case. *See* 443 F 2d at 1308-13.

In this case we too have a prior order, but Blair County has not complied with its terms. Therefore, we find a speedy trial violation both from the law of the case and because all four *Barker* factors weigh in Burkett's favor. Blair County's noncompliance with the May 30, 1985 order of the district court removes any doubt as to whether the normal remedy of discharge, *see Strunk*, 412 U.S. at 440, should be replaced by a lesser remedy, *see Braden*, 410 U.S. at 486. At this late juncture no remedy short of discharge can vindicate Burkett's right to speedy trial.[38]

2. *Due Process Violation*

Although the delay in sentencing despite the order violates the Sixth Amendment speedy trial guarantee and by itself justifies discharge,[39] the delay in

38. Judge Garth suggests that an appropriate remedy might be not discharge but "to order release after the prisoner had served his statutory minimum sentence." Conc. & Diss. Op., Typescript at 14. We do not dispute that, as in *Brady*, such a remedy may on occasion be appropriate. However, in 140/141 Burkett has already served more than his statutory minimum, which would be no time at all. *See* 18 Pa. Cons. Stat. Ann. §§ 3502, 1103 (burglary punishable by 0 to 20 years); *id.* §§ 3921, 3925, 3902, 3903, 1103 (theft by unlawful taking and theft by receiving stolen property merge; punishable by 0 to 7 years); *id.* § 3502(d) (theft charges merge with burglary for sentencing purposes); *id.* §§ 2706, 1104 (terroristic threats punishable by 0 to 5 years); *id.* §§ 6301, 1104 (corruption of minors punishable by 0 to 5 years). Moreover, on the record before us, it appears that Burkett has not been credited in 161 or 284 for his time in jail from April 13, 1982 to June 24, 1985; as for his time in jail from February 7 to 13, 1981, he could not be credited in any case but 140/141. *See supra* at 4-6, 10 & nn. 12-13.

39. Because we find that the speedy trial violation warrants discharge, we could decline to reach the merits of the separate due process claim. However, for the reasons explained in the text, there is an independent due process violation and we deem it appropriate, in view of the drastic remedy, to develop that ground as well. We note too that the Supreme Court has only assumed *arguendo*, rather than so holding formally, that the Speedy Trial

sentencing also prohibits Burkett from pursuing an appeal in this case. Burkett's due process rights are thus implicated. We therefore examine the *Barker* factors as they apply to delay in appellate review, and we find that this delay in sentencing has deprived Burkett of due process.

Burkett has shown monumental delay in this case. There being no excuse for the delay, two of the *Barker* factors inure immediately to his favor. Moreover, he asserted his right to speedy sentencing at least by March 1984, and the record reflects his efforts to obtain trial transcripts to prepare post-verdict motions in August 1982 and July 1983.

We also find that Burkett has been prejudiced by the monumental delay he has encountered in his attempts to secure his appeal as of right. "In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, and the consequent drastic loss of liberty, is unlawful." *Evitts*, 469 U.S. at 396. Due process guarantees a criminal appellant certain minimum safeguards to make that appeal adequate and effective. *See id.* at 393-94; *Griffin*, 351 U.S. at 20. In this case, it is not only that Burkett has been deprived his right to review "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Rather, he has also been prejudiced because of "the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Rheuark*, 628 F.2d at 303 n.8. Moreover, the possible anxiety and concern that speedy trial rights protect, and which may have arisen from the extreme delay in

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clause applies to post-verdict proceedings. *See Pollard*, 352 U.S. at 361. *But cf.* cases cited *supra* at 27 (lower courts definitively applying Speedy Trial clause). Hence, stating an additional ground for our decision is prudent.

sentencing, could have been compounded by the delay in allowing an initiation of appeal. *See id.* Finally, we have noted that the district court in its Order of May 30, 1985, found that Burkett was prejudiced in this way by his delayed sentencing and that order is not subject to collateral attack. The prejudice is equal for the delay in appeal and is only exacerbated by the continued delay. In sum, the actions of the Blair County Court have not merely been undesirable, but so fundamentally unfair that they amount to a violation of the process which Burkett is due. Because of the unusual circumstances of this case discussed above, we find discharge the appropriate remedy for this due process violation.

3. *Disposition*

In 140/141, Burkett has now been incarcerated for more than six years without the finality that sentencing imparts to a trial and without the guaranteed appellate determination of whether it is proper to imprison him at all on these charges.[40] He has shown prejudice to his right to a speedy trial and to fair procedure, and such egregious delays have violated fundamental conceptions of justice, fair play, and decency. Moreover, Blair County continues to violate a court order that would have permitted a lesser remedy than discharge. When pressed by this Court, the Assistant District Attorney representing Blair County conceded that the record was sufficient for this Court to order discharge as to 140/141. Tr. Or. Arg. 25.[41]

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40. We note additionally that he was imprisoned for more than four years before any sentence was imposed on him, and even that sentence (in 284) has not yet been finally affirmed under the appellate process due Burkett under Pennsylvania law.

41. MS. COHEN: I have to be very honest with you, Your Honors. You put me in a very tough position.

"Although the failure of the district court to apply the correct legal standard should normally result in a remand, we need not remand if 'the record permits only one resolution of the factual issue.'" *A.J. Canfield v. Honickman*, 808 F.2d 291, 307 (3d Cir. 1986) (quoting *Pullman Standard v. Swint*, 456 U.S. 273, 291-92 (1982)). The undisputed material facts in this case constitute a continuing violation of Burkett's speedy trial and due process rights. Under the unusual circumstances of this case, including the ongoing violation of the federal court order and Blair County's concession as to the appropriate remedy, it appears that no relief short of discharge could fully remedy these violations. We therefore order that the district court issue a writ of habeas corpus forthwith and discharge Burkett from his convictions in Nos. 140 and 141 of 1981.

B. *No. 161 of 1981*

Burkett was arrested in 161 on February 13, 1981, convicted on January 20, 1982, and sentenced on July 10, 1985. He has been unable effectively to appeal this conviction and sentence, however, because of the trial court's delay in filing an opinion and the delay of the Blair County prothonotary in transmitting the record, which was due in Superior Court more than 21 months ago.[42]

I think perhaps on the record on 140 and 141, this Court can make a very adequate decision of what to do with that matter, and that decision might appropriately be to discharge and dismiss, after five and a half years.

42. *See supra* at 10-11 & nn.14-16; *see also supra* at 15.

The district court held in May 1985 that, if Burkett were promptly sentenced, no Speedy Trial Clause violation would have been established. We did not disturb that order in denying Burkett a certificate of probable cause, and he proffers no facts that would suggest that the *Barker* factors should now be weighed differently. Because Burkett was promptly sentenced, it is the law of the case that he is not entitled to relief under the Speedy Trial clause.[43]

However, Burkett has additionally met delay in the processing of his case for referral to the appellate court. This delay implicates his right to due process of law, and we must therefore analyze it under the four factors of *Barker*. Under the first factor, the factual record reveals that delay certainly exists: it has been almost two years since he was sentenced, yet, until a scant months ago, well after this case was argued to us, the trial court had not taken the first step to clear Burkett's way for appeal, and it is still not certain that his way has now been cleared.[44]

As for the second factor, the county has offered no excuse whatsoever for this continuing delay in completing the process, guaranteed under Pennsylvania law, of determining whether Burkett is properly incarcerated under his January 1982 conviction on these charges. As noted *supra* at 6 n.7, 11 nn.14-16, under Pennsylvania law the trial court could not transmit the record until the relevant opinion had been filed; even now, it is not clear that the

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43. Judge Garth believes that the procedure in the district court in May 1985 was so defective that we cannot rely on its findings. Conc. & Diss. Op., Typescript at 8. If he were correct, we would also have to remand Burkett's speedy trial claim in 161 as well as 140/141. We, however, believe that the question of the propriety of the district court's procedure and order was one for direct appeal. *See supra* at 34-35 n.35.

44. *See supra* at 10-11 & nn.14-16; *see also supra* at 15.

record has been transmitted, and the appeal cannot proceed without the record. Because Burkett has diligently asserted his right to appeal, the third *Barker* factor also weighs heavily in his favor.

As for the fourth *Barker* factor, we find that the factual record is not sufficiently developed to allow us to make a determination concerning prejudice. Although the length of Burkett's post-verdict incarceration without being able to appeal approaches the length of the corresponding delay in 140/141, an undetermined portion of the resulting prejudice in 161 may have been mitigated or cured by Blair County's prompt sentencing of Burkett following the May 30, 1985 order of the district court. We will therefore remand for factual findings concerning the types of prejudice we have identified, *see supra* at 32, and for a balancing of the *Barker* factors.[45] It is therefore the district court in the first instance that will determine if the delay in initiating appellate review has been so egregious as to deny Burkett his due process guarantees.

It appears that Burkett raised only the issue of delay in his habeas petitions because he believed he could raise no other issues until the delay was remedied. Because delay has excused any non-exhaustion of any issues which Burkett has to this point attempted to raise in the state courts, however, we will direct the trial court to allow him on

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45. We are confident that Blair County will now quickly remove the remaining impediments to Burkett's appeal -- the remand in no way affects the ability of the Blair County Court of Common Pleas to expedite the transmission of the record to Superior Court and otherwise exercise its power to advance Burkett's appeal. *See supra* at 10-11, 15. Such prompt action may well put an end to any possibility of the district court finding prejudice. That determination, however, is for the district court to make in the first instance.

remand to plead and join other such federal claims if he so desires. The district court should appoint counsel.[46]

VI. *CONCLUSION*

It is not within our province to judge the stewardship of the Blair County Court of Common Pleas in disposing of its criminal docket. Judge Brumbaugh in his very recent opinion denying Burkett relief in 161 has recounted in some detail the judicial manpower shortage afflicting that county from 1979 to 1982).[47] The States Supreme Court has made clear, however, that "negligence or overcrowded courts should be weighted . . . [against the government] since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 514. Including Burkett's previous habeas action, federal courts have before today called attention to unconstitutional delays in processing criminal cases in Blair County on at least three occasions: *Hooper v. Cunningham*, Civ. No. 84-2818 (W.D. Pa. Feb. 21, 1985); *Burkett v. Cunningham*, Civ. No. 85-769 (W.D. Pa. May 30, 1985); *Schandelmeier v. Cunningham*, No. 86-3251 (3d Cir. Dec. 2, 1986).[48] This is the most egregious of all. For

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46. The Federal Public Defender, who is familiar with the case, would appear to be the appropriate choice if he is willing to serve.

47. We note, however, that Pennsylvania has a unified judicial system, *see* Pa. Const., Art. V § 2(a); *supra* at 11 n.16. The Pennsylvania Supreme Court has used its authority to assign other judges to Blair County, including Burkett's judge in 140/141, but the measures taken so far do not appear to have resolved the problems.

48. In *Schandelmeier* we reprinted excerpts from letters written by two federal magistrates to the Chief Judge of the U.S. District Court for the Western District of Pennsylvania. One wrote that cases involving egregious Blair County delays "appear to be the rule rather than the exception to practice in Blair, and present a continuous source of concern." A second suggested notifying the

the reasons we have set forth, partial relief will be granted to Burkett now and he may attempt to obtain further relief on remand.

When a county justice system is unable to provide convicts with even the most rudimentary due process -- decisions on whether they received fair trials, decisions whether and for how long they should be incarcerated, and performance of the ministerial tasks of compelling transcripts and transmitting records to the appellate courts -- federal courts are compelled to grant relief when the violations reach constitutional dimensions, both to guard the rights of those who may have been falsely or unfairly accused and to guard the integrity of our justice system itself.

In No. 86-3074, the judgment of the district court will be affirmed.

In No. 86-3121, the judgment of the district court will be reversed. Concerning Blair County Criminal No. 161 of 1981, the case will be remanded for further proceedings consistent with this opinion. Concerning Nos. 140 and 141 of 1981, the case will be remanded to the district court with instructions to issue the writ of habeas corpus forthwith, discharging Burkett from his conviction on those charges.

Because we have reversed concerning two of Burkett's three convictions, costs in these consolidated appeals shall be taxed two-thirds against appellees and one-third against appellant.

Honorable Robert N.C. Nix, Jr., Chief Justice of the Supreme Court of Pennsylvania, "so that hopefully he can arrange for Blair County to get additional help rather than for us to start ordering the release of Blair County prisoners because of speedy trial violations." *Id.*, slip op. at 7-8. Although we did not grant relief to Schandelmeier, who (unlike Burkett) did not appear to have pressed the issue of delay in the state courts, we sent a copy of our then unpublished opinion to Chief Justice Nix. We do so again with today's opinion.

GARTH, *Circuit Judge, dissenting in part and concurring in part:*

My disagreement with the majority stems from the majority's insistence that the district court issue a writ which would discharge Burkett's conviction under Criminal Actions Nos. 140 and 141. I disagree in three respects.

First, I believe that the majority has erroneously relied on a "law of the case" doctrine to find that Burkett has carried his burden of demonstrating prejudice. Second, because I believe that the majority has erred in this respect, I cannot agree with the majority's decision to decline to reach the issue of whether a court can find a post-verdict speedy trial violation without first finding that the defendant was prejudiced by the post-verdict delay. I conclude that a finding of prejudice is crucial not only to the legal conclusion that a speedy trial violation has resulted from a post-conviction sentencing delay, but also to the determination of the remedy to be imposed. Third, I conclude that it is the district court, not this court, which must decide in the first instance, not only whether Burkett has carried his burden of demonstrating prejudice, but also what remedy is appropriate if a speedy trial violation is found.

I.

The majority has concluded that Burkett has been prejudiced by his sentencing delay and that this prejudice has been established as the "law of the case." Maj. Op., typescript at 34. The majority "discovers" prejudice from the fact that, in March 1985, a magistrate, without a hearing or other evidence before him, speculated that it would "appear reasonable to conclude" that the delay caused some loss to Burkett even though Burkett had been incarcerated on two unrelated convictions for 16 to 32 and 22 to 44 years.

Supplemental Appendix at 11. Incredibly, the finding of prejudice, according to the majority, is disclosed by the order, entered May 30, 1985, which *dismissed* Burkett's writ!

To my mind, the magistrate's report, when read as a whole, contained nothing that properly could be termed a finding that prejudice was demonstrated, and, to the limited extent that the magistrate even discussed prejudice, his argument was unsound and unsupported by evidence. The magistrate argued that although one might reasonably conclude that there was some prejudice present, the degree of prejudice did not appear to him to be particularly great in comparison to other cases.[1]

Even if I were to conclude, as does the majority, that the vague language from the magistrate's report constituted a "finding" of the existence of prejudice, such a finding would have to be reversed on appeal as a conclusory "finding" that is completely unsupported by

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[1]The magistrate's report reads, in part:

> "As the Court recognized in *Smith v. Hooey*, 393 U.S. 374, 378 (1969), where delay occurs, an individual *may* lose certain advantages such as receiving concurrent sentences and may even receive an enhanced sentence.
>
> While the extent of prejudice cannot be measured with exactitude, it *would appear reasonable to conclude* that the delay by the Blair County courts has caused some loss to the petitioner. . . .
>
> Nevertheless, in view of the fact that the petitioner could recieve [sic] a sixty-one to a one hundred and twenty-two year sentence, *it would appear that the degree of prejudice which might have occurred is not as critical as in some other Blair County cases* where the possible period of incarceration is much shorter. . . ."

Supplemental Appendix at 10-12 (emphasis added). It is on the basis of these "findings" of the magistrate that the majority has chosen to mandate that the district court enter an order dismissing Burkett's convictions as to Criminal Actions Nos. 140 and 141.

evidence. The magistrate conducted no hearings and took no testimony concerning, for example, whether prosecuting Burkett's appeal has been made more difficult by the delay. Moreover, I suggest that it is impossible, if not outrageous, to conclude, as apparently the majority has, that an individual who is already incarcerated on two unrelated charges (and is serving a term of at least 22 years) is prejudiced as a matter of law by being subjected to a delay (even one of five and one-half years) while awaiting a sentencing decision on a third unrelated conviction.

Although facts *might* be established to demonstrate prejudice in such a case, we have yet to be shown by Burkett that this is such a case. It is for that reason that a hearing is required to determine whether the requisite prejudice does in fact exist.[2] *See United States v. James*, 459 F.2d 443, 444-45 (5th Cir.), *cert. denied*, 409 U.S. 872 (1972)(individual who had already been sentenced on two unrelated charges denied relief after unreasonable sentencing delay on third charge because no prejudice found).

The majority also argues that the County has waived its right to contest the "finding" of prejudice because it did not attempt to appeal the district court's order. Maj. Op., typescript at 34. But even if the County had been sufficiently prescient to construe the magistrate's vague language as a finding of prejudice, the County cannot be deemed to have waived any

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[2]Indeed, as I read Burkett's brief, there is only one allegation of prejudice raised in respect to his sentencing delay in Criminal Actions Nos. 140 and 141. Burkett claims that he was prejudiced because he was forced to spend time incarcerated without an opportunity for appellate review (which cannot be had before the imposition of sentence). However, I note that Burkett would be spending this time in prison regardless of the disposition of his appeals in Criminal Actions Nos. 140 and 141, because he has been sentenced to 16 to 32 years under Criminal Action No. 284 and 22 to 44 years under Criminal Action No. 161.

objection to such a finding because the County would not have been permitted to seek review of an isolated "finding" of fact. Findings of fact are not appealable, orders are; and the County was not aggrieved by the order which dismissed Burkett's petition for writ of habeas corpus. Thus, in my opinion, the majority has been obliged to torture both the language and the analysis of the district court's order in an effort to find a basis for its conclusion that the May 30, 1985 order was one which could be appealed by Blair County.[3] *See* Maj. Op., typescript at 35 n.35.

The majority has chosen to disregard the clear language of the district court's order of May 30, 1985, which dismissed Burkett's petition. Instead, it has chosen to construe the order as one granting

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[3]The majority also argues that the May 30, 1985 order was a final order. I do not dispute this fact, but it proves nothing. A certificate of probable cause was never issued from the district court's May 30, 1985 order, which is the order adopting the magistrate's finding that "it would appear reasonable to conclude that the delay . . . has caused some [prejudice]." Therefore, Burkett could not appeal, *see* 28 U.S.C. § 2253 (no appeal allowed unless a certificate of probable cause issues); nor could Blair County appeal as it was not aggrieved, *see* note 5, *infra*.

It was obviously for this reason that Burkett, in accordance with the district court's direction, filed a new petition. Thus, the majority's "law of the case" theory simply cannot withstand analysis because even if Blair County believed that the magistrate's report contained a finding of prejudice, and even if Blair County desired to dispute such a finding, it could not do so because neither party could appeal the May 30, 1985 order which adopted the suspect finding. Having no opportunity to challenge the May 30, 1985 order, Blair County cannot have waived any objections it might have had to the findings that may appear therein.

Although the majority claims that I have found "that the procedure in the district court in May 1985 was so defective that we cannot rely on its findings," maj. op., typescript at 44 n.43, the majority misunderstands my position. I do not claim that the procedure in the district court was defective. I argue only that there was no finding of prejudice made.

"conditional approval" of the writ. Maj. Op., typescript at 9 n.10 & 35 n.35. Such a reading is clearly untenable. The district court's order: (1) *denies* the petition for habeas corpus relief; (2) *directs* that Blair County dispose of the post-trial motions and impose a sentence within sixty days; and (3) *recommends* that Burkett file a *new* petition for habeas relief if Blair County fails to act in accordance with the court's directive.[4]

The majority has obviously ignored the clear language of the district court's order, which denied Burkett's petition and directed that a new one be filed if appropriate. Alternatively, if the majority has not ignored the district court's order, then it must believe that a district court is somehow empowered to grant a future writ of habeas corpus -- one that has not yet been filed!

Moreover, if "conditional approval" of the writ had been granted, then Burkett would have had no need to have appealed to this court, for his petition would have been successful, and he would have already obtained his relief. Because Blair County had not met the conditions of the writ's denial within sixty days, the "conditional grant" of habeas corpus would have taken

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[4]The May 30, 1985 order reads in pertinent part:

> "IT IS ORDERED that the petition of Wayne Burkett for a writ of habeas corpus is dismissed and that a certificate of probable cause is denied, unless the Court of Common Pleas of Blair County fails to dispose of the post-trial motions and impose any appropriate sentence within sixty (60) days.
>
> IT IS FURTHERED ORDERED that in the event that the Court fails to act in accordance with this directive that the petitioner file a new petition, that jurisdiction on the merits be assumed by this Court and that an appropriate merits determination be made."

Appendix at 154.

effect thereafter, and Burkett would have been freed by the district court's order. This, of course, is not what happened because that, of course, was not what the district court ordered.[5]

The majority has concluded that Burkett has been prejudiced by the delay in sentencing despite the fact that Burkett's incarceration has not been due to the state court's failure to sentence him under Criminal Actions Nos. 140 and 141. Rather, Burkett's incarceration is due to the unrelated convictions under Criminal Action No. 284 (under which Burkett is serving a sentence of 16 to 32 years) and Criminal Action No. 161 (under which Burkett is serving a sentence of 22 to 44 years).

Because I do not believe that delay alone is sufficient to establish a speedy trial violation in a post-conviction context, and because I cannot agree that the record discloses any prejudice or that the majority's flawed law of the case doctrine can furnish prejudice where none exists, I cannot agree with the majority's decision to order the district court to discharge Burkett's convictions in Criminal Action Nos. 140 and 141.

II.

Because the majority insists upon holding that a finding of prejudice has already been made and thus constitutes the "law of the case," it righteously declines to reach the legal issue of whether a finding of prejudice to the defendant is a prerequisite to a

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[5]I am also confident that, if the County had attempted to appeal the district court's order under this improbable theory of "conditional grant" of relief, this court would have been compelled to hold that no appellate jurisdiction obtained because the County as appellant was in no way aggrieved by the order entered. Perez v. Ledesma, 401 U.S. 82, 87 n.3 (1971)(a prevailing party may not appeal a decision in its favor).

post-verdict speedy trial violation. Maj. Op., typescript at 36, n.36. I, however, am forced to confront this legal question because I cannot accept the majority's "law of the case" theory. I conclude that a true, not a manufactured, finding of prejudice to the defendant is crucial to the legal conclusion that a speedy trial violation has resulted from a post-conviction sentencing delay.

Although I agree with the majority's general conclusion that a defendant's constitutional right to a speedy trial must be upheld post-conviction as well as pre-trial, *see, e.g. United States v. Campisi*, 583 F.2d 692 (3d Cir. 1978), I believe that significant differences are found between the two situations. As the Tenth Circuit recently pointed out in *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir.), *cert. denied*, 107 S. Ct. 413 (1986):

> Obviously a delay in sentencing involves considerations different from those related to pre-trial delay. The alteration of the defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process. Once guilt has been established in the first instance the balance between the interests of the individual and those of society shift proportionately.

As the court in *Perez* noted, the major considerations underlying the constitutional right to a speedy trial may be grouped into two categories: societal interests and interests of the individual defendants. For the accused individual, lengthy *pre-trial* delay impinges upon his rights because, even if he is not incarcerated prior to trial, the pre-trial delay forces him to "liv[e] under a cloud of anxiety, suspicion, and often hostility." *Barker v. Wingo*, 407 U.S. 514,

533 (1972). The disruption of an individual's life while awaiting trial, especially when subjected to pre-trial incarceration, will usually be substantial. "The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." *Id.*, at 532-33. Under our system of law, whereby an individual is presumed innocent until proven guilty, such considerations are and should be given substantial weight. Yet these considerations lose much of their force in the post-conviction context. *Post-conviction*, there is less fear that an innocent individual is being improperly subjected to the deprivations inherent in incarceration. Although the individual is subjected to some uncertainty, the post-conviction uncertainty differs both in degree and in kind from the pre-trial uncertainty. As I have observed, *pre-trial* an individual's anxiety revolves around a finding of innocence or guilt, freedom or deprivation of liberty. *Post-conviction* the individual knows that punishment is imminent; it is uncertain only as to degree.

Additionally, the societal interests in a speedy trial are less directly implicated in the post-conviction context. From society's point of view, the right to a speedy trial serves to insure that a just result has been achieved. "The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. . . . Moreover, the longer an accused is free awaiting trial, the more tempting becomes the opportunity to jump bail and escape." *Barker*, 407 U.S. at 519-520.

As is the case with interests of the individual defendants, the societal interests in a speedy trial are stronger in the pre-trial context than they are post-conviction. Post-conviction, society no longer needs to fear that delay will result in the criminal justice system's being deprived of the opportunity to mete out an appropriate punishment. Likewise, in the post-conviction context, societal fears that an accused individual will be able to thwart justice by manipulating delay to his advantage, are largely eliminated.

Additionally, the societal interest in limiting the possibility that a defense has been impaired by a lengthy delay, although applicable in both the pre-trial and post-conviction settings, is a much greater interest in a pre-trial context.[6] With long delays pre-trial, witnesses may disappear, their memories may fade, and other evidence may be lost. Although post-conviction delays can result in similar problems if an appeal is filed and it is determined that an evidentiary hearing is required, the individual who has already received a presumptively fair trial has suffered far less hardship than the pre-trial individual whose rights have been prejudiced while having his guilt adjudicated in the first instance.

Therefore, whenever the four factors enumerated by the Supreme Court in *Barker v. Wingo*, a case which concerned *pre-trial* speedy trial issues, have been

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[6]In United States v. MacDonald, 456 U.S. 1 (1982), the Supreme Court noted that the Due Process Clause better protects against the prejudice caused by the mere passage of time than does the Speedy Trial Clause. *Id.* at 7-8. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Id.* at 8.

applied to the post-conviction context, they have been applied with recognition given to this changed balance of interests. This change is manifested through a greatly increased emphasis on determining the prejudice, if any, suffered by the defendant. Indeed, prejudice is the polestar of any post-conviction speedy trial analysis.

> While a showing of prejudice may not be absolutely necessary in order to find a Sixth Amendment violation, we have great reluctance to find a speedy trial deprivation where there is no prejudice. This is especially true in a post-conviction situation. In fact, it might be said that once a defendant has been convicted it would be the rarest of circumstances in which the right to a speedy trial could be infringed without a showing of prejudice. Moreover, the necessity of showing substantial prejudice would dominate the four-part balancing test. This is so because of the traditional interests the speedy trial guarantee is designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. . . .
>
> Most of those interests diminish or disappear altogether once there has been a conviction. Because the rights of society proportionately increase, the prejudice claimed by the defendant must be substantial and demonstrable.

Perez, 793 F.2d at 256 (citations omitted). *See also United States v. Merrival*, 600 F.2d 717, 720 (8th Cir. 1979)(appellant must show prejudice before court can find his right to a speedy trial is violated by sentencing delay); *United States v. Campbell*, 531 F.2d 133, 1335 [illegible] (5th Cir. 1976), *cert. denied*, 434 U.S. 851 (197[illegible]). "[illegible]cial question in determining whether

sentencing delay resulted in violation of right to speedy trial is whether actual prejudice resulted); *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974)(violation of right to speedy trial has occurred when there has been unreasonable delay in sentencing and that delay has resulted in prejudice); *Brady v. Superintendent, Anne Arundel County Detention Center*, 443 F.2d 1307, 1310-11 (4th Cir. 1971) (eight year sentencing delay had not resulted in sufficient prejudice to warrant release).

Therefore, as I understand the settled jurisprudence of the various circuits that have considered the special problem of applying the *Barker v. Wingo* speedy trial violation analysis in a post-conviction setting: (1) delay alone is insufficient to support a finding of constitutional violation; (2) the factor of prejudice becomes central to the inquiry; and (3) the burden to proof is on the defendant to establish prejudice.[7]

III.

Finally, even if I were to assume, as does the majority, that Burkett has met his burden of establishing prejudice, nevertheless I would not leap to the conclusion that dismissal of the charges is the proper remedy. The majority itself acknowledges that when the right to a speedy trial has been violated, only the prejudice of the violation must be rectified. Maj. Op., typescript at 27 (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 486 (1973)) & typescript at 29 ("the remedy must be discharge with prejudice to retrial *if no lesser remedy can rectify the prejudice to the defendant*") (emphasis added).

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[7]On burden of proof, *see, e.g.*, Juarez-Casares v. United States, 496 F.2d 190, 192 (5th Cir. 1974).

Despite this clear holding that lesser remedies may be appropriate, the majority has refused to consider whether the prejudice suffered by Burkett -- a prejudice which the majority assumes but which has not been found -- could be cured by a lesser remedy than dismissal of the charges. This is undoubtedly because, in the absence of any real finding of prejudice, it is impossible to know what specific needs require remediation.

In some factual situations, it might be appropriate for the district court to impose the statutory minimum punishment, rather than order discharge. *See Brady*, 443 F.2d at 1311 (court cannot assume that any prejudice resulted from sentencing delay when statutory minimum punishment was imposed). Although I acknowledge that the remediation decision is for the district court and not for us, I just cannot believe that an individual such as Burkett (who has been convicted of serious crimes, including terroristic threats, burglary, theft, corruption of minors, and receiving stolen property, and whose actual prejudice, as the record reveals, is limited to being incarcerated, not on these charges, but on related unassailable convictions, *see* note 2, *supra*) is entitled to discharge as a matter of law as a result of sentencing delay.[8]

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[8]In Criminal Action No. 140, Burkett was convicted of burglary, theft, receiving stolen property, terroristic threats, and corruption of minors. He was acquitted of indecent assault and indecent exposure. The jury was hung on the charges of rape and recklessly endangering.

In Criminal Action No. 141, Burkett was convicted of burglary, theft, receiving stolen property, and terroristic threats. He was acquitted of indecent assault, indecent exposure, and involuntary deviate sexual intercourse. The jury was hung on the charges of rape, recklessly endangering, and unlawful restraint.

In Criminal Action No. 161, Burkett was convicted of rape, aggravated assault, terroristic threats, indecent assault, indecent exposure, unlawful restraint, and recklessly endangering.

Indeed, even if consideration were to be given to the "anxiety and uncertainty" discussed by the magistrate, those considerations, in the context of post-conviction delay, do not warrant discharge as a matter of law. *See Perez*, 793 F.2d at 257 ("the anxiety of an accused is not be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be").

The majority appears to believe that, when faced with a substantial delay in an individual's speedy trial rights, it is appropriate for this court to address unresolved factual issues concerning both prejudice and the proper remedy for any prejudice that is found. In my view, by so holding in this case, the majority has usurped the district court's traditional role of fact-finder. *See United States v. Campbell*, 531 F.2d 1333, 1336 (5th Cir. 1976), *cert. denied*, 434 U.S. 851 (1977) (where no explicit finding of prejudice has been made, remand to district court is appropriate). Similarly, once prejudice has been found, it is the district court which should decide what remedial action is required.

While the majority's desire for an expeditious resolution of this matter is understandable in light of Blair County's long inaction, the procedure invoked, whereby the majority has departed from its role as an appellate court and has sought to find facts as to prejudice and to impose remedies, is unprecedented. In *Codispoti v. Howard*, 589 F.2d 135 (3d Cir. 1978), this court was confronted with an appeal from a prisoner who had been waiting twelve years for the state court to rule on his motion for a new trial. Upon

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In Criminal Action No. 284, Burkett was convicted of burglary, attempted rape, recklessly endangering, terroristic threats, simple assault, and harassment.

determining that Codispoti had effectively exhausted his available state remedies, with appropriate guidelines, we *remanded* the case to the district court for an evidentiary hearing on the issues of delay and remedy. The disposition ordered in *Codispoti* is an exemplar of the appropriate exercise of appellate review and disposition:

> . . . the record before us shows no valid explanation as to why the state court has waited almost twelve years to dispose of a post-trial motion. Presumptively such a delay should impel us to consider the prisoner's petition unless it can be shown that he has waived his appeal or some extraordinary occurrence has taken place.
>
> We will therefore remand this case to the district court for an evidentiary hearing to determine why the petitioner's new trial motion has not been disposed of. The burden of proof at this hearing shall rest with the respondent, James Howard. We recommend that the evidentiary hearing be conducted by the trial court and not by the magistrate.
>
> It is further ordered that if the trial court concludes that the delay is inexcusable, it should then determine whether there were errors committed at Codispoti's trial which were of a constitutional dimension. If there were constitutional violations, the court should further determine whether a new trial should be held or whether due to the passage of time the charges must be dismissed.

Id. at 142 (footnote omitted). Indeed, when, as in the instant case, the delay is in no way attributable to delay

or inaction by the federal district court, a remand is the only permissible response.[9]

Consideration of the appropriate remedy becomes even more important when it is recognized that, due to a loss of judicial manpower, this court may soon be inundated with many similar cases from Blair County. *See Schandelmeier v. Cunningham*, No. 86-3251, slip op. at 6-8 (3d Cir. Dec. 2, 1986). Indeed, there may be other counties in Pennsylvania where similar delays in sentencing have occurred. I do not think that this court should be the instrument for declaring wholesale releases of prisoners or discharges of convictions without the essential inquiry being made as to whether the affected prisoner has been prejudiced. *Cf. Harris v. Pernsley*, No. 87-1025 (3d Cir. May 15, 1987) (Garth, J., dissenting).

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[9]In support of its determination to discharge Burkett's conviction without an evidentiary hearing as to whether Burkett suffered prejudice, the majority relies on a statement made at oral argument by counsel representing Blair County, to the effect that the court "might appropriately [decide] to discharge and dismiss, after five and a half years." Maj. Op., typescript at 42 n.41.

I suggest that the majority's reliance is misplaced. We have not always greeted concessions as being dispositive. Beyond that however, I do not believe that this concession can be given credit for two reasons. First, there is no authority that exists which would discharge a prisoner in a post-conviction speedy trial context without a strong showing of prejudice by the prisoner. It is evident that the Assistant District Attorney representing Blair County at no time addressed the issue of prejudice.

Second, I do not think that we can abdicate to counsel our judicial function of deciding and implementing the law. As I have pointed out, delay alone is not sufficient in a post-conviction setting to constitute a constitutional violation. *See* discussion in text, *supra*.

Prejudice must be shown, and the mere fact that counsel, in the throes of an oral argument, does not recognize the prevailing jurisprudence, does not mean that we too can ignore it.

I do not mean to imply that I believe that a prisoner loses his constitutional right to a speedy trial because the state courts are overburdened. I am not urging that Burkett be denied relief, providing it is appropriate. Rather, I maintain only that, for both prudential and jurisprudential reasons, an evidentiary hearing must be held to determine whether Burkett has actually suffered prejudice sufficient to warrant dismissal of his conviction in Criminal Actions Nos. 140 and 141.

IV.

Other than with respect to the majority's disposition of Burkett's conviction under Criminal Actions Nos. 140 and 141, I join the majority's opinion.

As to Burkett's conviction under Nos. 140 and 141, the majority does not dispute the fact that a post-conviction speedy trial violation cannot result in the dismissal of a valid state conviction unless the prisoner has carried his burden of demonstrating prejudice sufficient to warrant discharge of his conviction. Maj. Op., typescript at 36 n.36.

The record in this case does not demonstrate that Burkett has even alleged colorable prejudice, let alone met his burden of demonstrating it. Thus, I believe that it should be the district court, in the first instance, before whom Burkett must demonstrate prejudice sufficient to carry his burden of establishing a constitutional violation and sufficient to warrant a remedy of discharge.

I therefore dissent from so much of the majority's decision which directs the district court to issue a writ which would discharge Burkett's conviction under Criminal Actions Nos. 140 and 141.[10]

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[10] I have not addressed the due process discussion that the majority opinion contains. I am somewhat puzzled by the majority's

due process discussion, maj. op., typescript at 29-34 & 40-42, inasmuch as the majority has held that, because a Sixth Amendment speedy trial violation has occurred, Burkett's conviction must be discharged. It would therefore appear superfluous to discuss due process doctrine, where the only result of such an analysis would be the imposition of a lesser remedy than the discharge already ordered. *See* Maj. Op., typescript at 33 (normal remedy for a due process violation is not discharge).

However, if the majority had remanded to the district court, as I have urged it to do, then of course it would have been appropriate for the district court to consider both the Sixth Amendment speedy trial and the Fifth Amendment due process claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETITION FOR WRIT OF HABEAS CORPUS
(28 U.S.C. 2254 - PERSONS IN STATE CUSTODY)

WAYNE PAUL BURKETT K-8505, Petitioner
(Full name and prison number, if any)

vs.

THOMAS A. FULCOMER, SUPERINTENDENT, ET AL., Respondent
(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner) AND The Attorney General of the Commonwealth of Pennsylvania, Additional Respondent. Answering Respondent Blair County District Attorney

Case No. 88 1397
(To be supplied by the Clerk of the District Court)

(If petitioner is attacking a state court judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered and use this form. If petitione has a federal sentence to be served in the future under a federal judgmer which he wishes to attack, he should file a motion under 28 U.S.C. 2255, in the federal court which entered the judgment. DO NOT USE THIS FORM FOR 2255 PURPOSES.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
(INSTRUCTION--READ CAREFULLY)

(1) This petition must be legibly handwritten or typewritten and signed by the petitioner. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished.

APPENDIX 8a

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fee and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgment entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and three copies must be mailed to:

Clerk
U.S. District Court
P.O. Box 1805
Pittsburgh, PA 15230

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

(9) The law requires that all issues which you seek to raise in the federal district court must first have been presented to the highest court of the state for consideration either on direct appeal or in a post conviction petition. This means that if you are a Pennsylvania prisoner, every issue which you seek to raise in the Court, must have been unsuccessfully presented to the Superior Court of Pennsylvania, and to the Supreme Court of Pennsylvania in a petition for allocatur, or else have been presented directly to the Pennsylvania Supreme Court.

The only exception to this rule is where it would be futile to raise the issues in these courts.

PETITION

1. Name and location of court which entered the judgment under attack: Court of Common Pleas Blair County-Hollidaysburg,PA 16648
2. Criminal Docket Number criminal action number 284 of 1982
3. Date of imposition of sentence June 24,1985
4. Length of Sentence 16 to 32 yrs. Max. sentence
5. Nature of offense or offenses for which you were convicted: Burglary; Criminal Attempt (Rape); Simple Assault;Terroristic Threats;
6. What was your plea? (Check one) Not Guilty (X) Guilty ( ) Nolo ~~Contendere~~ ( ) Offenses convicted of; Recklessly Endangering and Harrassment
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____
7. If you were found guilty after a plea of not guilty, check whether finding was made by: Jury (x) Judge only ( ) Judge of Summary Offense
8. Did you testify at the trial? Yes (X) No ( )
9. Did you appeal from the judgment of conviction? Yes (X) No ( )
10. If you did appeal, answer the following:

(a) First Appeal

(1) Name of Court Superior Ct of PA Pittsburgh
(2) Docket Number 974 PGH 1985
(3) Result Denied Jan.12,1987 Date 1-12-87
(4) Citation (If known) appears at Pa.Super. 525 A.2d 813 (1987)

(b) Second Appeal

(1) Name of Court Supreme Ct of PA Pittsburgh
(2) Docket Number 145 W.D. 1987
(3) Result Denied Allowance of Appeal Date 12-28-87
(4) Citation (if known) Unknown

(c) If you filed a petition for certiorari in the United States Supreme Court, give details: _____

11. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal, including petitions under the Post Conviction Hearing Act?
Yes (X) No ( ) Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987)

12. If your answer is "Yes" to 11, give the following information:
(1) Name of court U.S. Dist. Ct For Western Dist. of PA
(2) Nature of proceeding Habeas Corpus Burkett v Cunningham, CV.A.
(3) Grounds raised Nos. 85-0769 and 85-1966; Speedy Trial and Due Process of Law being denied by virtue of inordinate and unjustiable delay in di sposing of Post-trial motions and imposing sentence
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes (x) NO ( ) 2nd Writ 85-1966 December 23,1985
(5) Result Dismissed failure to exhaust District court's order Date 1-15-86

(b) As to any second petition, application or motion give the same information:
(1) Name of Court N/A
(2) Nature of proceeding
(3) Grounds raised
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) NO ( )
(5) Result N/A Date

(c) As to any third petition, application or motion give the same information:
(1) Name of Court N/A
(2) Nature of proceeding
(3) Grounds raised
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
(5) Result N/A Date

(d) Did you appeal to the highest state court having jurisdiction the result of any action on any petition, application or motion:

(1) First petition, etc. Yes (X) No ( )
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

13. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. You should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Grounds: 1./ THAT PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY VIRTUE OF THE FOLLOWING : see page 6

14. If any of the grounds listed were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

15. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (X)

16. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Attry John Woodcock ,Jr. Esq. P.D.
(b) At arraignment and plea same Blair Co. Public Defender
(c) At trial same Hollidaysburg,PA 16648
(d) At sentencing same Woodcock withdrew on appeal
(e) On Appeal Attorney Fredrick B. Geig Jr. 401 N. Logan Blvd Altoona,PA 16602

a.) Defense counsel eliciting highly prejudicial testimony of petitioner's 5th Amendment Right against self-incrimination.

STATEMENT OF FACTS IN SUPPORT

That defendant's counsel,(petitioner and defendant the same person for the purpose of this petition) when cross-examining the officer William Kephart questioned theofficer as follows:

Q: Did he tell you where he had been on the night of the eleventh?

A: Yes, I believe he told me he was at home.

Q: And did he give you names of the other people who were there at that time ?

A: Yes

Q: He answered all your questions ?

A: No.

Q: He was cooperative with you though ?

A: No, I asked him different questions and he indicated that he didn't wish to speack to me any longer. (N.T.124)

Petitioner contends that the Trooper's reference to his assertion of his Constitutional right against self-incrimination was highly prejudicial,and gave forth a prejudicial admission of guilt which was harmful err, that counsel had no reason to jeaopardize the defendant's interest by asking such question where there existed immenient danger of defendant's silnce being mentioned thereby prejudicing the defendant's case.

Petitioner elected to answer the Trooper's questions, then effectively withdrew his waiver of his right to remain silent when during the interrogation he indicated that he did not wish to speack with the officer any longer.

That counsel failed to request a cautionary instruction from the court to cure the prejudicial refrence nor was one given sua sponte, which deprived of a fair trial.

b.) Failing to take exception to court's erroneous instruction to the jury on alibi being inadequate and prejudicial

STATEMENT OF FACTS IN SUPPORT

That defense counsel was ineffective as a result ofhis failure to timely object and/or take exception to the court's erroneous instruction to the jury on Alibi, said charge did not conform to law and was inadequate as well as prejudicial.

The lower court instructed the jury incorrectly to the effect,

> "...You should consider this evidence along with all other evidence in the case in determing whether the Commonwealth has met its burden of proving beyond reasonable doubt that the crimes charged aganist this defendant were actually committed by him and that the defendant himself committed them". (see:Charge T.T. pg. 201)

As the charge makes clear one of the essential elements necessary for conviction was lacking and was not contained in the court's charge i.e. That the Commonwealth must prove beyoud reasonable doubt that a crime was actually committed .., and that the defendant himself committed it.

At no time is the Commonwealth relieved of its burden of proving all the essential elements necessary for conviction muchless not proving beyond reasonable doubt that a crime was actually committed or had taken place.

Petitioner avers that he was as a matter of law entitled to a correct instruction to the jury regarding the essential elements necessary for conviction, that the Commonwealth must prove guilt beyond a reasonable that a crime had actually taken place.

Further, additional err was committ ed when the court failed to instruct the jury"even if not wholly believed" (Alibi evidence) could still raise reasonable doubt of his presence at the scene of the crime at the time of its commission and thus of his guilt.

That the court did not make clear to the jury that defendant's failure to make out his Alibi or prove same to the satisfaction of the jury is not tantamount to guilt,and defendant's Alibi "even if not wholly believed could still raise reasonable doubt, that the jury in petitioner's case may have convicted him by virtue of his failure to prove his alibi whereas if the jury would have beam properly apprised of the law it would have been made clear to tb jury that the defendant does not have to prove his alibi or anything for that matter the burden never shifts.

Petitioner was entitled to a specific instruction on the burden of proof on the alibi issue because the jury was likely to become confused about the burden of proof. The jury was not apprised of the correct law which would have assisted them in proper evaluation of the Commonwealth's burden of proof with respect to alibi,and defendant had no burden of proving his alibi and even if not wholly believed it could still raised reasonable doubt which would have required acqutial had counsel voiced a timely objection to the charge the court would have corrected the err and provided the correct law to the jury.

His failure to object to the court's erroneous instrution on alibi was prejudicial err and requires a new trial.

a.) Failing to move to suppress Identification evidence that was created at the preliminary hearing said evidence being Highly suggestive, a one-on-one corporeal line-up, under highly suggestive settings and condistions at a time the defendant was without counsel, and when counsel was Constitutionally required to assure fairness and to protect the defendant's right toa fair trial which was infringed as a result of the suggestive procedure.

STATEMENT OF FACTS IN SUPPORT

Prior to the preliminary hearing taking place the defendant was identified by the Commonwealth's witness on a one-on-one basis, while the defendant was in handcuffs and counsel was not present.

Further, prior to the commencement of the hearing the witness was asked by the identifications officer: " Was this the guy that broke into your home and attacked you .? The witness after a moments hesitation answered yes. That this was a critical stage in a proceedings and counsel's protection was required to assure fairness. Approximately 5 minutes thereafter counsel entered the hearing room accompied by the District Magistrate followed by counsel's secretary. The defendant relayed what had occured prior to his entering the hearing room and counsel replied " I will take care of it later".

At no time prior to trial was a motion filed challenging the - suggestive procedure or the admissibility of the identification that would be offered at the subsequant trial.

That the identification at the criminal trial was the product of this suggestive procedure which had given rise to a likelihood of misidentification which denied the defendant Due Process.

That the defendant was the only person in the room with handcuffs binding his hands which was inherently suggestive settings and procedure.

That there was a substantial likelihood of misidentification and the evidence of the line-up was unreliable.

Petitioner contends that the witnesse's intially described her assailant as height 5 ' 2 ", white male, weight 115 - 120 lbs. Brown hair and eyes; between 20 and 25 years of age (N.T. 96.) in an attempt to do a photo spread a follow up officer one state Trooper Richard W. Lingenfelter received the height as being 5 ' 3"-5' 5", dark hair and dark eyes, he stated at trial and then stated "or brown hair and brown eyes. N.T. 104). This description does not square with that of the petitioner at the time of arrest and the witness changed her description at the preliminary hearing and again at trial.

That the identification was unreliable, there was no independant evidence of the defendant's guilt and the verdict was based on the tainted identification.

That prior to trial counsel should have acted competently by challenging the improperly influnced identification and prevented the witness from making an in-court identification inorder that the fact-finders not be deceived as to the sourse of the witnesses' ideitification testimony. The evidence (at Trial) that was given relative to the identification of the actor was obtained in violation of the defendant's right to counsel. Counsel was incompetent and the evidence tainted, as such petitioner was denied a fair trial by its admittance.

d.) Failed to move to suppress in-court ideitification as being overly suggestive which deprived of a fair trial, stemming from a (suggestive Photographic Display.

STATEMENT OF FACTS IN SUPPORT

That counsel was ineffective for failing to object or moving to have suppressed the in-court identification evidence, when it was realized that the Commonwealth's witness was shown two color photographs of the defendant (Commonwealth's exhibits 14 & 15) Photographs of the defendant taken two days after his arrest on the instant charges, viewed outside the court room prior to the witness's in-court identification, said procedure was a highly suggestive photographic line-up with the defendant's pictures being the only person whose photos were displayed to the witness, which constituted a photographic line-up and highly suggestive procedure.

That this procedure was primarily used to enhance the witnesses identification of the defendant, which gave rise to a substantial likelihood of misidentification thereby dening the defendant Due Process of law and since the in-court identification was inadmissable its admittance violated the defendant's right to a Fair trial guarenteed him through the Due Process clause.

At the criminal trial (N.T. 81) the witness during cross-examination by defense counsel exposed the suggestive procedure used by the Commonwealth the witness was asked:

Q: Mrs. Hummel after the preliminary hearing and before the testimony in court have you been shown another picture of the defendant ?

A: Over here this morning I saw a picture Yes.

After which counsel abrutly terminated his cross-examination. The court went into a recess upon reconvening the Commonwealth recalled the witness to the stand and the following transpired.

Q: Mrs Hummel shortly before lunch I believe you indicated to Mr Woodcock that you had seen some pictures of the defendant this morning ?

A: Yes.

Q: And these photographs, you had seen them for the first time today, is that right ?

A: Yes.

Q: I will show you what has been marked for the purposes of identification as Commonwealth's Exhibit No.14 and 15 and can you take a look at both of them please. ?

A: Yes.

Q: And would these be two of the photographs that you had mentioned to Mr. Woodcock right before lunch ?

A: Yes. (N.T. 83-84.)

That these two photographs of the defendant taken after his arrest were two color photos which depicted defendant with a full beard.

That these photos were shown to the witness outside the court room immediately prior to making an in-court identification for the purpose of enhancing the witness's ability to identify the defendant which prodded the witness into stregthening her identification of the defendant. The photos being displayed on a one-on-one basis due to the fact that the preliminary hearing was held April 24,1982 and the criminal trial was not held untilApril 24,1982. The criminal trial was not held until January 26,1983 by doing so the Commonwealth was trying to assure that the witness would identify the defendant and not faulter in her identification. The Commonwealth used an improper suggestive photographic line-up confronting the witness with two photos of the defendant taken after his arrest (It should be noted that there was stark differences between the photographes contained in Commonwealth's Exhibit No 11 which includes a picture of defendant

and the photographs of Commonwealth's exhibits Nos. 14 and 15 which were taken after petitioner's arrest).

That since the suggestive procedure occurred the day of trial and immediately prior to the in-court identification which was not discovered until well after the trial was underway. Counsel could have argued that he had no prior opprotunity before trial to move for suppress of this evidence. That the witnesses identification testimony stemmed from the illegal tainted suggestive photo line-up which deprived of a fair trial, by virtue of the jury being supplied with evidence of suggestive identification procedure.

e.) Failing to preserve petitioner's claim that Petitioner's 5th, 6th and 14 Amendment rights of the United States Constitution was violated to a Speedy trial and Due Process of Law by virtue of inordinate, protracted delay in disposing of Post-trial motions, Imposing sentence and processing petitioner's appeal.

STATEMENT OF FACTS IN SUPPORT

Petitioner contends that his counsel was ineffective for failing to perserve the petitioner's claims that his Constitutional Right to a Speedy Trial and Due Process of Law protections of United States Constitution were violated by virtue of inordinate, protracted delay in disposing of petitioner's Post-Trials Motions, imposing sentence and processing his appeal.

That petitioner's criminal trial was concluded January 28,1983, counsel filed Post-trial motions timely February 2,1983.

That the lower court took no action to dispose of these motions for a period of time that was inexcusable,thus prompting petitioner to file a Petition for Writ of Habeas Corpus in the Lower Blair County Court on March 12,1984 which challenged the Constitutional denial of a Speedy Trial and Due Process of Law violations of the petitioner's rights and the delay itself, requesting discharge.

That Blair County failed to hold a hearing on this Petition timely pursuant to Title 42 PS. 6501 -6505.

That a hearing was held on this petition October 11,1984 (transcripts available). The Court administrator testified that there

was no justification or "real Explination" Notes of Testimony 26) for not setting a hearing/since the the notes of testimony were transcribed well over one year in two months preceding the Habeas Corpus hearing. Therefore the delay was unjustied in disposing of Post-trial Motions.

That the court excepted an oral motion for bail reduction and the court at that time announced at the conclusion of both hearings that a decision would be rendered at the end of the week.

That after becomming convinced that the court was not going to Rule the petitioner filed Pro Se with the Superior Court a petition for Writ of Habeas Corpus In Plenary Review (petition for Review docketed at Number 1611 Burkett v. Cunningham, Misc. No. 1611 of 1985 raising the delay as Constitutional violations) when the Superior Court would not respond Petitioner filed A Petition For Writ of Mandamus with the lower court requesting an order on counsel compelling him to file a Petition for Writ of Habeas Corpus in the United States court for The Western District of Pennsylvania. Counsel filed a Habeas Corpus March 28,1985 with the U.S. District Court .(Burkett V. Cunningham, Cv.A. No. 85-0769) which challenged the delay and Constitutional violations stemming from the delay were voiced.

The District Ccurt dismissed the Writ and directed that the Petitioner's Post-Trial Motions be disposed of and that an appropriate sentence be imposed.

Petitioner was not made aware of court's order until after the time had run out in which to file objections to the U.S. Magistrate's Report and Recommendations. The action of counsel then foreclosed petitioner from appealing the court's findings. An Appeal was taken to the United States Third Circuit court of appeals Burkett v. Cunningham, 85-3346). The Third Circuit denied petitioner a certificate of Probable Cause without prejudice August 8,1985 to filing a new petition in the District Court.

In the interim, the lower court uder date of order of June 6,1985

denied the state Habeas Corpus action only after the U.S. District Court directed that the matters be disposed of. Post-Trial motons were denied May 10,1985 and petitioner sentenced June 24,1985 to a period of incarceration of not more then 32 years nor less then 16 years plus fines. (It should be pointed out that petitioner had voiced his fears in the U.S. Court of Appeals for the Third Circuit that were that court to allow Blair County to sentence petitioner, the Petitioner would be subject to retailiation in the nature of a more severe sentence.

That petitioner filed a new petition in the District Court For Writ of Habeas Corpus Burkett v. Cunningham, Cv.A.No. 85-1966, petitioner was given a hearing on that petition by the District Court December 23,1985. The District Court uphled the Magistrate's dismissing of the Writ by order of January 15,1986 since the matter was then in the state Superior Court. The District Court requested that in the first instance the state courts reach the merits before the petitioner would be permitted to raise the delay in the Federal courts.

That it should be noted that at the hearing held it was conceeded by the Commonwealth that the record was not transmitted to the state Superior Court timely pursuant to PA.R.A.P. 1931, the record was due in the Office of the Superior Court September 1,1985 and was not received until January 2,1986. What-is-more this was not a full record since the trial court's opinion was not filed until July 16,1986 and received in the Superior Court July 24,1986, the appeal could not proceed without the lower court's opinion).

That All delay is attributed to the lower court and District Attorney's office.

It is contended that Attorney Woodcock did not raise the issue of the delay in his orginal brief filed with the Superior Court thus it was proper that new counsel Attorney Geig raise the issue at the first available time which would be the direct appeal by virtue of extror---

dinary circumstances of prior counsel's ineffectiveness.(Note Post- Trial motion's counsel Attorney Woodcock did perserve the delay claims by a specific Post-trial motion pursuant to Pa. R.Crim.P.1123 which consequantly waived the issue for appellate review. However, Woodcock did present the issue in his statement of reasons of all matters complained of in the appeal filed August 14,1985). See: Docket enteries lower court.

That the Superior Court in the matter of the petition for review in the Petition For Writ of Habeas Corpus (Misc. Doc. No. 1611 of1985 Burkett v. Cunningham,) ruled that they were without jurisdiction and dismissed the petition without prejudice and refered Burkett to the Supreme Court of Pennsylvania on August 28,1985. Burkett filed another subsequant petition for Review with the State Supreme Court Commonwealth of Pennsylvania ex rel. Wayne P. Burkett v. Richard B. Cunningham, Misc. Doc. No. 70 W.D. 1985 filed September 27,1985 denied April 24,1986 by chief Justice NIX without Opinion or required answer from the Commonwealth.

That in excess of two (2) years and three (3) months had elapsed since the criminal trial and disposition of Post-Trial Motions and Petitioner without the benefit of sentence until June 24,1985.

Petitioner remained continuously incarcerated from the date of arrest, in excess of three (3) years and one (1) month and was extremely prejudice thereby.

The reason for the delay has never been explained adequately or with appropriate justification.

That petitioner has continuously asserted his right to a Speedy Trial throughout the delay in addition to all motions and petitions he filed he also wrote numerous letters to his Attorney of record, to the court as well as the court's administrator. (Commonwealth conceeded at Fed. Evidentiary hearing held to 85-1966 that there was no question petitioner asserted his right Hearing Transcripts Pg 53.) Some of these letters were entered into evidence at the Lower court evidentiary hearing as exhibits the lower court Habeas Corpus Transcripts are available)

That a considerable amount of phone calls were also made to the petitioner's attorney and the Court Administrator.) See; Also Exhibits entered into record at hearing of 85-1966 Burkett v. Cunningham.)

The Petition for Habeas Relief in the lower court went unheeded.

Petitioner had also requested that his bond be lowered so that he would be released while these matters were pending however, prior counsel (Woodcock) refused to accommodate his requests and pleas while the petitioner continued to be incarcerated unable to adequately assert his rights.

There is no question that petitioner asserted his right to a Speedy trial which was futile ,save for the Federal Petition .

Prejudice is illustrated as follows:

a.) First his inability to take an appeal to the appellate courts of Pennsylvania, presenting the merits of his Constitutional claims of error that occurred at pre-trial, trial and post-trial within a reasonable period of time, because said appeal could not be made until a judgment of sentence was ordered.

b.) Secound, that any unjustified delay in proceeding involving the vindication of petitioner's Constitutional Rights and errors that occurred at his criminal trial is inherently prejudicial.
(Petitioner's claims of err are made stale and essentially reduced to dust due to the passage of time since evidence necessary to meet petitioner's burden of proof at any evidentiary hearing which is recuired,since none was provided in the state courts, providing a full and fair opprotunity to vindicate his ineffective assistance of counsel claims,,is lost and forever gone since memory of his witnesses and that of trial counsel will need to be relied upon as petitioner's chief evidence.

c.) Third, the most glaring prejudice would be the loss of a critical alibi witness,to appellant/petitioner's defense, who was absolutely critical to his defense, Namely Mr. Mark Yonkey , said witness was the only Alibi witness that was not related to petitioner who is no longer available to him.

d.) Fourth, the length of the delay being as such (several) years), the petitioner's memory and that of his witnesses are weak and faded, as such it would be impossible to meet the Commonwealth's case against him thus rendering his defense impaired and his retrial unfair.

e.) Fifth, Petitioner was forced to live under a cloud of suspicion in the county jail in the eye of the public for such a long period of time, whereas, if this matter had been resolved promptly he would have been able to clear his good name.

f.) Sixth, That a more severe sentence was given the petitioner, without any consideration of the period of time that he had been incarcerated because he attempted to assert his Constitutional Rights.

g.) Seventh, that the delay stymied the judicial process and barred appellate review until now.

h.) Eight, petitioner suffered anxiety, financial hardship and disruption of family relations by reason of the inordinate delays.

I.) That no affirmative prejudice is necessary to a findings that a Speedy trial was denied.

(Note: It should be noted that during the period that petitioner filed his Superior Court briefs and his Petition for Allowance the Third Circuit Court had not yet issued it's opinion in Burkett v, Cunningham, 826 F.2d 1208 (1987) Filed July 21,1987 therefore petitioner did not have the benefits of the new explicit right to a Speedy trial also encompasses the stages of sentence and Due Process clause protects against delays in appeals as of right Id at 1211 also 1220 N.10 & 1221. therefore in his state briefs he could only argue the assumption of Pollard v. United States, see Burkett at 1220.).

That the trial court did not prepair and file its opinion of record until July 1s,1986 therefore the Appeal could not proceed without this opinion that was recieved by the Superior court as part 2 of the record on July 24,1986 which made the record complete for the purposes of Appellate review. December 23,1985

Note: At Federal Evidentiary hearing held/to 85-1966 the respondent's counsel Ellan Cohen had stated as an officer of the court that the complete record was sent to the Superior Court that very day which includedthe trial court's opinion acoording to the respondent. See: Hearing transcripts of 85-1966 at Pages 46 thur 47) which was stated inorder to mislead the court into thinking that the Appellate Process was proceeding normally it was seven months later that the Superior Court received an opinion from the trial court.)

That Due to the Delay in disposing of Petitioner's Post-verdict Motions; Imposing sentence and processing the record for Appellate review petitioner has been substantially prejudiced and Denied his Constitutional Rights to a Speedy trial and Due Process of Law.

That petitioner's counsel (Woodcock) was Constitutionally ineffective for failing to preserve this claim for review by filing a specific Post-trial Motion. (Note: counsel did raise this claim in the lower court in the Habeas Corpus petition but never specifically filed a Post-trial motion pursuant to the rule (1123) for preserving the claim.) which prejudiced petitioner's ability to obtain redress of his Speedy trial and Due Process rights being violated.

f./ That there was insufficent evidence to prove the offense of Recklessly Engangering Another Person beyond a Reasonable Doubt.

STATEMENT OF FACTS IN SUPPORT

In the instant case there was absolutely no evidence of any

physical conduct which placed or may have placed the victim in danger of death or serious bodily injury.

Even taken in light most favorable to the Commonwealth, the pertinent circumstances underlying the event that led to the charge that petitioner was alleged to have pushed open the door of the residence,went inside the home, after being there for a period of time he consumed water given him by the occupant and helped himself to a cigarette, certain verbal exchanges were made. Subsequantly, the perpetrator went into the kitchen wherein the occupant attempted to exit the residence, but was obstructed from doing so .

The perpetrator obtained a knife, according to the evidence at trial, the victim then fainted, for a few seccunds, revived herself and left the residence to a neighbor's home where police were summoned.

In Evaluation of the testimony there was no evidence that by any physical act or conduct on part of the perpetrator that resulted in the placing of the victim in danger of death or serious bodily injury by what had transpired. It had never been testified that the knife was pointed or placed within striking distance of the victim nor any injury sustained by the fall when the victim allegedly fell to the floor.

It should be pointed out that the information charging the petitioner with this offense this charge was premised on the following facts according to the Commonwealth : " Wayne Paul Burkett did unlawfully, recklessly hold a knife toward said Bernice Hummel, placing her in danger of death or serious bodily injury:" .

There was no evidence that the knife was even held towards the victim.

It is axiomatic that in criminal trials the proof offered by the Commonwealth must meassure up to the charge made in the indictment. Therefore the Commonwealth must prove that petitioner held a knife toward the victim in this case and that by this conduct placed or may have placed the victim in danger of death or serious bodily injury. (Petitioner's conviction of this charge on proof less then beyond a reasonable doubt violates Due Process).

g.) That there was insufficent evidence to prove beyond a reasonable doubt that petitioner entered residence with specific intent to commit a crime therein , namely the crime of (Rape) and that this Specific intent was formed prior to entering the residence to prove Burglary.

STATEMENT OF FACTS IN SUPPORT

That petitioner contends that there was insufficent evidence to prove beyond a reasonable doubt petitioner entered the residence with a specific intent to commit a crime therein namely the crime of Rape, and that this specific intent was formed prior to entering the residence in order to prove Burglary.

It would appear under the facts of the case that the intent to commit the rape was formed after he was inside the residence for a period of time, nothing in the actor's words or conduct would support a specific intent to commit a rape when he entered.

The Commonwealth was required to prove beyond a reasonable doubt that petitioner entered the home with a specific intent to commit a rape. The Commonwealth's evidence does not pass muster to prove beyond a reasonable doubt that petitioner entered the home with a intent to commit rape when he entered. (Petitioner's conviction on this charge on proof less then beyond a reasonable doubt violates Due Process).

(f) In any post-conviction proceeding none

(g) On appeal from any adverse ruling in a post-conviction proceeding. none

17. Were you sentenced on more than one count of any indictment, or more than one indictment, in the same court and at the same time? Yes ( ) No (X)

18. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) And give date and length of sentence to be served in the future N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (X)

Wherefore, petition prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Huntingdon - Huntingdon Co, Pennsylvania
(City, County, State)

I, Wayne L Burkett declare under penalty of perjury that the foregoing is true and correct.

Executed on 6/17/88
(Date)

Wayne L Burkett
(Signature of Petitioner)

NOTE: No Notary Certification Required)

WAYNE P. BURKETT, PETITIONER	:	IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
v.	:	
THOMAS A. FULCOMER, et al, RESPONDENTS	:	CIVIL CASE NO. 88 - 1397

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

AND NOW comes Respondent, Thomas A. Fulcomer , through the District Attorney of Blair County, and files this Answer to Petitioner's Petition for Writ of Habeas Corpus, as follows:

1. Admitted

2. Admitted

3. Admitted

4. Admitted

5. Admitted

6. Admitted

7. Admitted

8. No allegation is made.

9. Admitted

APPENDIX 9a

10. a. Admitted

b. Admitted

11. Admitted that Federal habeas Corpus petitions were filed in the Western District of Pennsylvania at Civil No. 85 - 0769, and Civil No. 85 - 1966.

12. a. 1. Admitted

2. Admitted

3. Admitted

4. Admitted

5. Admitted

b. No allegation is made.

c. No allegation is made.

d. Admitted that appeal of the federal habeas corpus action was made to the Third Circuit, and petition for certiorari thereafter was made to the United States Supreme Court. It is denied that appeal of the action was made to the highest state court.

e. N/A

13. Denied. Petitioner received effective assistance of counsel throughout the course of all proceedings. Petitioner additionally has either failed to exhaust his state remedies

or is raising issues already litigated and finally resolved against him.

Overlooking the Petitioner's violation of several of the instructions for completing the petition, Respondent answers the allegations of this paragraph seriatim:

a. Denied. Petitioner was afforded competent counsel throughout the trial. Petitioner's claim lacks merit to the extent that it even pleads a colorable issue. Further, Petitioner's counsel pursued a course reasonably designed to advance Petitioner's interests. Finally any error, if it were to be deemed to have occurred, is harmless beyond a reasonable doubt.

Petitioner presented this claim on direct appeal and was denied relief.

A full transcript of the trial exists.

b. Denied. Respondent incorporates the above paragraphs herein by reference. As with the above claim, no error of law occurred, as will be seen by examination of the court's charge in the trial transcript.

Petitioner presented this claim on direct appeal and was denied relief.

The trial transcript is available.

c. Denied. Respondent denies in toto Petitioner's allegations and demands strict proof of same. If Petitioner could prove his allegations of suggestive confrontation, Respondent alleges an independent basis existed for the identification challenged, and further alleges that any error is harmless beyond a reasonable doubt.

Petitioner presented this claim on direct appeal and was denied relief.

No records supporting this claim are available.

d. Denied.

Respondent incorporate the above paragraphs herein by reference.

Petitioner presented this claim on direct appeal and was denied relief.

A full transcript of the trial exists.

e. Denied. Petitioner's claims of due process and speedy trial violations are meritless.

As Petitioner admits, prior claims on this ground have been raised and dismissed for failure to exhaust state remedies. No attempt subsequent to that dismissal has been

made to raise the instant claims in state court, leaving the state court remedies unexhausted.

All of the claims of prejudice by Petitioner are denied and strict proof is demanded.

f. Denied. The evidence presented at trial was sufficient to support the jury's verdict.

Petitioner presented this claim on direct appeal and was denied relief.

The trial transcript is available.

g. Denied. Respondent incorporates the above paragraphs herein by reference.

The trial transcript is available.

14. No allegation is made.

15. Admitted. The respondent is unaware of any pending matter.

16. Admitted

17. Admitted

18. Admitted. By way of further explanation, Petitioner was granted a writ of habeas corpus to another conviction at

.A. No. 140-141 Blair County of 1981. Petitioner has been ranted a writ of habeas corpus to yet another conviction at .A. No. 161 Blair County of 1981, which is the subject of a nding appeal to the Third Circuit in BURKETT v. CUNNINGHAM, ivil No. 86 - 3302 (3d. Cir. 1988).

WHEREFORE, Respondent prays that the instant petition be ismissed.

Respectfully submitted,

Keith A. Pesto, Esquire
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WAYNE PAUL BURKETT, K-8595 Petitioner	)	Civil Action No. 88-1397
vs.	)	
THOMAS A. FULCOMER, et al., Respondents	)	

TO: THE HONORABLE COURT OF ABOVE:

PETITION TO AMEND
PETITION FOR WRIT
OF HABEAS CORPUS

AND NOW COMES, Wayne P. Burkett, Petitioner, Pro Se, wherein he files this petition to amend his Petition for Writ of Habeas Corpus which he finds necessary in view of the court's confusion as to the specific claims presented and in support states as follows:

1.) That petitioner has filed with this court a petition for Writ of Habeas Corpus pursuant to 28 U.S.C section 2254.

2.) That the United States Magistrate in a Report and Recommendation filed December 7,1988 relative to this petition, misapprehends the substantive Constitutional claim to which petitioner claims he is entitled to relief.

3.) Specifically, the Magistrate views this issue as one seeking to redress a claim where petitioner's attorney failed to preserve petitioner's speedy trial and due process challenges.

APPENDIX 10a

4.) Petitioner has presented this Speedy trial and due process claim under the claim of ineffective assistance of counsel due to counsel's failure to preserve the claim in the appellate stages of this case as Murray v. Carrier, 477 U.S. 478, 488 (1986) requires that counsel's ineffectiveness for failing to preserve the Speedy trial and due process challenges be presented as an independant Sixth amendment violation in the state court and exhausted before the Federal courtwill review the petitioner's claims. As was noted in Kimmelman v. Morrison, __U.S.__106 S.Ct 2574 (1986) the Supreme court held that an ineffective assistance claim is based on a seperate constitutional right and is therefore cognizable even though the alleged ineffective assistance consisted primarily of counsel's mishandling of a Fourth-Amendment objection.

5.) In light of the procedural history of this case the Murray v. Carrier, supra, mandate that counsel's ineffectiveness for failing to preserve the claim be presented as an independant claim to the state court before the federal court will review the claim;default was misapplied by appellate counsel Attorney Geig to this case since the claim was never actually defaulted due to the fact that post-trial motion counsel John Woodcock could not if he want to, comply with Pennsylvania R.Crim. 1123 requirements that the matter, and specific issue to be raised on appeal was required to be raised by a specific post-verdict motion. The time for filing Post-verdict motions according to the rule is ten days after verdict, the issue being raised was one dealing with inordinate delay in disposing of post-verdict motion and imposing sentence, several years after the ten day time period for which post-verdict motions are required.

6.) Attorney Geig when he under-took the representation of the case mistakenly misunderstood the rule (Pa.R.Crim.P. 1123) thus, thinking the matter was waived since it was not raised by Attorney Woodcock by specific post-verdict motion. see: Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975).

7.) In order to preserve the issue for appellate court eview Attorney Geig raised the issue under prior counsel being neffective for failing to preserve the claim, which would provide he requisite extraordinary circumstances necessary to raise the ssue on direct appeal. see: Commonwealth v. Smallwood, 497 Pa. 476 42 A.2d 222 (1982) which counters the waiver.

-.8.) The issue of waiver or default was never an issue in he case until Attorney Geig interjected it since the issue petitioner's peedy trial and due process challenges could have been presented irectly to the Superior court and Supreme Court without reference o post-verdict motion counsel's ineffectiveness. What-is-more, these ssues were ruled on by the trial court without objection by the state nd the state has thoroughly argued the merits in the brief to the uperior Court. see: Commonwealth v. Slaughter, 482 Pa. 538, 394, .2d 453 (1978) and Commonwealth v. Pugh, 476 Pa. 445, 383 A.2d 183 1975).

9.) All of the petitioner's attorney who came into contact ith this case had one aim and that was to enmesh the procedural history of the case from the time petitioner started complaining bout the delay his case was receiving in Blair County to that end ne court fails to see the trees through the forest created.

10.) Petitioner would therefore find it necessary to omit claim (e) in his petition for Writ of Habeas Corpus at Page 13 -19; and Memorandum of law in support of his petition for relief at pages 32- 44 of all reference to -- (continue on next page)

counsel's ineffective assistance of counsel for failing to preserve petitioner's claim that petitioner's 5th, 6th and 14th amendment rights of the united states constitution was violated to a Speedy trial and due process of law by virtue of inordinate, protracted delay in disposing of post-trial motions, imposing sentence and processing petitioner's appeal.

11.) Petitioner would request that the issue be amended to :

(e) That petitioner's 5th, 6th and 14th Amendment rights of the United States Constitution was violated to a speedy trial and due process of law by virtue of inordinate delay in disposing of post-trial motions, imposing sentence and processing petitioner's appeal

12.) Petitioner would incorporate by reference thereto the facts in support of his claims as stated in his petition for Writ of Habeas Corpus at pages 13 thur. 19; and petitioner's memerandum of law in support of his claims, with the exclusion of all reference to post-verdict motions counsel's ineffectiveness for failing to preserve the claim.

13.) That Rule 11 of the Rules Governing Habeas Corpus, incorporates Fed.R.Civ.P. and implement the provisions of Civil rule 15 (a) which allows petitioner to amend when the court deems necessary.

14.) That in the interest of justice petitioner should be permitted to amend his petition to reflect this claim since he unwittingly raised an independent Sixth Amendment violation i.e. counsel failure to preserve the claim when it was superfluous to what was necessary to preserve the issue for Habeas Corpus review.

15.) That were the court to refuse or deny this amendment-- to the petition for relief then petitioner will be required to appeal to the Third Circuit, who when reviewing petitioner's appeal at Burkkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987) was led to understand that this matter was before the state Supreme court, including the delay claim could be address in the first instance Burkett, supra at id. 1208 note 4.

16.) It was the state who argued that the matter was currently before the state Supreme Court who in the first instance should address the claim. Petitioner now, after all these years since the filing of the first Habeas petition Burkett v. Cunningham, CV.A. 85-0769 and Burkett v. Cunningham, CV.A. No. 85-1966 the secound petition, and after the court insisted both times petitioner filed for relief/and now exhaust, he is, for some reason beyond his immediate control, denied review of a claim that goes to the justice of his incarceration. It is fundamentally unfair to petitioner and his right to Habeas review of his claim.

17.) That the respondent will not in any manner be prejudiced if the court were to grant this amendment, since there could be no possible objections to an unrepresented prisoner amending his Habeas petition to properly state the claim for which he claims entitlement to relief.

WHEREFORE, Petitioner prays that the honorable court permit and grant this amendment in the interest of justice and petitioner shall forevermore pray to the court:

Respectfully Submitted:

Dated: 12-13-88

Wayne P. Burkett

Wayne P. Burkett
Drawer R X-8595
Huntingdon, PA 16652

WAYNE P. BURKETT, PETITIONER	:	IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
V.	:	
THOMAS A. FULCOMER, et al, RESPONDENTS	:	CIVIL CASE NO. 88 - 1397

RESPONDENT'S AMENDED ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

AND NOW comes respondent, Thomas Fulcomer, through the District Attorney of Blair County, and files this Amended Answer to Petitioner's Petition for Writ of Habeas Corpus:

1. Admitted

2. Admitted

3. Admitted

4. Admitted

5. Admitted

6. Admitted

7. Admitted

APPENDIX 119

8. No allegation is made in the petition. Petitioner did testify at trial.

9. Admitted

10. a. Admitted b. Admitted

11. Admitted

12(a) 1. Admitted

2. Admitted

3. Admitted

4. Admitted

5. Admitted

b. N/A

c. N/A

d. The dismissal of the petition filed to No. 85-0769 was appealed to the Third Circuit Civil Appeal No. 85-3346. The dismissal was affirmed. The dismissal of the petition filed to No. 85-1966 was appealed to the Third Circuit to Appeal No. 86-3074. The dismissal was affirmed sub nom. Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987). Petitioner's petition for certiorari was denied.

e. N/A

13. Denied. Respondent incorporates the averments of his previous answer as if set forth herein.

a. Petitioner's Fifth Amendment Claim.

Petitioner claims a violation of his Sixth Amendment right to effective counsel by asserting that his trial counsel elicited testimony showing that petitioner invoked his right to remain silent. Petitioner bases this claim on a selectively excerpted portion of of trial counsel's cross-examination of of Trooper Kephart, which appears in full at N.T. 122-124.

Exhaustion: Petitioner presented this claim on direct appeal. The Superior Court of Pennsylvania denied relief. See Exhibit O.

Merits: STRICKLAND v. WASHINGTON, 466 U.S. 668, 80 L.Ed.2d, 104 S.Ct. 2052 (1984) provides that "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. Counsel is not ineffective unless petitioner proves, unaided by hindsight, that the acts of counsel "were outside the wide range of professionally competent

assistance." Id. . Further, petitioner must show that "{T}here is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been difference." 466 U.S. at 604.

Petitioner, seizing on two questions and answers in the cross-examination of Trooper Kephart, suggests that he was highly prejudiced by such testimony. The questions and responses were passing remarks in the largely successful strategy of trial counsel to portray petitioner as someone who maintained his innocence of the charges throughout and was candid about his whereabouts, as the very next two questions, and the redirect testimony would show. N.T. 124-25. And see N.T. 123:

> Q. {trial counsel} And did the defendant come to the barracks then?
>
> A. {Kephart} Yes, he did.
>
> Q. The next morning wasn't it, the thirteenth?
>
> A. I don't know. I wasn't present. I don't know what time--
>
> Q. It was about 2 A.M. when he walked in wasn't it, as soon as he was informed that you were looking for him?
>
> A. Like I said I wasn't there.

To allow petitioner to claim that the employment of a widely used defense tactic - stressing the defendant's willingness to answer questions - is constitutionally offensive would allow a defendant two shots at the prosecution in every case, by allowing a defendant to introduce evidence of his willingness to answer questions and also to claim that his right to silence was abridged if this claim is disputed in any way by the Commonwealth's witness.

As to the second prong of the STRICKLAND test, defendant cannot reasonably assert that, if the inquiry of trial counsel was unreasonable, that it had a reasonable probability of affecting the trial. The questions were isolated, and at the end of the Commonwealth's case. The petitioner took the stand as the very next witness, and denied his involvement in the crimes. His cross-examination was free of any reference to statements made to the trooper. Under such circumstances no reasonable conclusion can be drawn that the exchange between petitioner's trial counsel and Trooper Kephart violated petitioner's Sixth Amendment rights.

b. Ineffective assistance of counsel through failure to except to the Court's alibi instruction.

Petitioner claims that trial counsel was ineffective by failing to object to the court's charge on the alibi defense.

Exhaustion: Petitioner presented this claim on direct appeal. The Superior Court denied relief. Exhibit "O".

Merits: Before counsel can be found ineffective even under the first prong of the STRICKLAND standard, petitioner must raise a colorable issue. This he fails to do, excerpting rather only a portion of the court's charge. The court's charge correctly instructed the jury under Pennsylvania law on the petitioner's presumption of innocence. N.T. 205-06 and the Commonwealth's burden of proof N.T. 205-06, 204.

Petitioner's contention that error was committed when the court did not instruct the jury that they could have a reasonable doubt even if they did not wholly believe the defendant's alibi merely asks the Court to rephrase the reasonable doubt instructions given in a

manner peculiarly favorable to him. COMMONWEALTH v. POUNDS, 490 Pa. 621, 417 A.2d 597, 603 (1980), reversing for a new trial because of a complete failure to give an alibi charge, does not support petitioner's contention that the alibi charge must be given in the terms he states. The then existing standard jury instruction on alibi, as well as the current one, Pa. S.S.J.I. (Crim) 3.11, show this plainly. In fact as an examination of the court's charge will show, the trial court gave defendant a more favorable instruction then petitioner was entitled to under state law. N.T. 220-01. See also the repetition of this theme in the court's identification instructions, N.T. 204.

c & d. Ineffective assistance of counsel through failure to suppress pretrial and trial identification of petitioner.

Petitioner claims that trial counsel was ineffective for failing to object to alleged pretrial identification by a Commonwealth witness (not named by the petitioner but presumably the victim), and ultimately her identification at trial.

Exhaustion: These claims were presented on direct

appeal. The Superior Court denied relief. Exhibit "O".

Merits: Again, no colorable issue is raised on which counsel could be alleged to be ineffective. The victim in the trial of petitioner, Mrs. Hummel, had a sufficient independent basis from which to identify the petitioner as her assailant, even if petitioner's allegations regarding suggestive pretrial identification are believed. Therefore counsel could not have successfully moved to suppress Mrs. Hummel's identification of petitioner. Counsel did obtain a favorable identification instruction from the court. N.T. 202; 204-05 ("and you must conclude that [the identification] is so supported [by the evidence] before you can accept it as accurate".) (emphasis added).

Mrs. Hummel testified that her initial contact with petitioner was a "very good" look, at close range, through a glass window onto a lighted front porch. N. T. 28-29. After petitioner pushed his way into her residence he was in her living room at a distance of a few feet for a the period of time to drink part of a glass of water, and then was actually in physical contact with the victim, who was facing him. N.T.

29-33; 38. Under these circumstances, even if a suggestive pretrial confrontation took place, trial counsel could not have succeeded in suppressing the identification testimony. See COMMONWEALTH V. TRAVAGLIA, 502 Pa. 474, 467 A.2d 288 (1983). Therefore no prejudice could have inured to the defendant.

e. Ineffective assistance of counsel through failure to preserve Speedy Trial and Due Process challenges.

Petitioner asserts counsel was ineffective for failing to preserve his Speedy Trial and Due Process challenges based on delay in disposing of his post-trial motions and processing his direct appeal.

Exhaustion: Petitioner attempts to raise, through ineffectiveness claims, his due process claims raised and previously dismissed by the Third Circuit in BURKETT v. CUNNINGHAM, 826 F.2d (3rd Cir. 1987) as unexhausted. Petitioner has not alleged any grounds which would relieve him of the necessity of raising his claims in state court.

Merits: Defendant attempts to raise, through ineffectiveness of counsel claims, the speedy trial claims previously dismissed. The respondent agrees with the dates alleged for trial, filing of post-trial motions, and decisions of state and federal courts set forth by petitioner. The respondent objects to the legal argument and conclusions in petitioner's statement of facts. Petitioner fails to set forth any facts which give rise to a claim under the applicable standards set forth in BURKETT v. CUNNINGHAM.

Petitioner has available to him state remedies to challenge the delay in processing his appeal, under the Post Conviction Hearing Act, now the Post Conviction Rights Act. The Superior Court held that the petitioner's speedy trial challenges were waived for failure to raise them in post trial motions. Exhibit "O". The attempt to include those issues in the petitioner's Petition for Allowance of Appeal, Exhibit "P", does not satisfy the exhaustion requirement, since issues not preserved below cannot be tacked on at a later stage of direct appeal.

Petitioner alleges that his petition for "[h]abeas [r]elief in the lower court went unheeded". It in fact was denied on June 6, 1985. Petitioner alleges no appeal of this denial. If petitioner's claim of ineffectiveness of counsel is based on prior counsel's failure to take a requested appeal from the denial of habeas corpus relief then he can raise that issue in the state court. If petitioner's claim of ineffectiveness of counsel is based on prior counsel's failure to include speedy trial issues in post-trial motions, he can raise that in a PCHA petition. In neither case can he assert the claims again, in this Court, without resort to the state court.

Respondent also denies petitioner's allegations of prejudice. The prejudice asserted as a result of delay in the direct appeal of petitioner's conviction is moot, that appeal having proceeded. The prejudice asserted without specificity regarding "vindication of petitioner's [c]onstitutional rights" is similarly moot. Petitioner's claims of delay resulting in inherent prejudice are legally inadequate since prejudice is a requirement of the BARKER v. WINGO test which the

petitioner has the burden of alleging and proving, not merely presuming from a given lapse of time. BURKETT v. CUNNINGHAM, Supra, 826 F.2d at 1219. Petitioner's claim of prejudice through the loss of an alibi witness is unfounded, where that witness testified on petitioner's behalf at trial.

f. & g. Insufficiency of evidence on the recklessly endangering and burglary convictions.

Petitioner asserts insufficiency of evidence on the state court convictions for recklessly endangering and burglary.

Exhaustion: Petitioner's claims were raised on direct appeal and denied by the Superior Court. Exhibit "O".

Merits: Petitioner does not raise any meritorious challenge to his convictions on these charges. A federal claim for habeas corpus on sufficiency grounds is not even cognizable unless the record is so totally devoid of evidence as to raise a due process issue. See JACKSON v. VIRGINIA, 443 U.S. 307, 61 L.Ed.2d 560, 99

S.Ct. 2781 (1979) rehearing denied, 444 U.S. 890, 62 L.Ed.2d 126, 100 S.Ct. 195 (1980).

The specific intent to commit a crime, as petitioner concedes in his brief may be inferred from the petitioner's conduct in pushing the victim's door open and subsequently stating his intention to have intercourse with the victim. See N.T. 29-30; 32-33) The petitioner's intent may be inferred from the circumstantial evidence, and the jury properly so found. Petitioner's suggestion that it would be reasonable to conclude that the intent was formed after entry is not relevant to the evidentiary standard.

The claim that the evidence of recklessly endangering is insufficient is likewise invalid, since the evidence showed the knife was held by petitioner at the victim while the petitioner threatened to cut her throat. N.T. 33, 71.

14. N/A

15. Admitted

16. (a)-(g) Admitted

17. Admitted

18. Admitted. By way of further explanations, Petitioner was granted a writ of habeas corpus to another conviction at C.A. No. 140-141 Blair County 1981. Petitioner was granted a writ of habeas corpus to a third conviction at C.A. No. 161 Blair County 1981, currently on appeal to the Third Circuit in BURKETT v. CUNNINGHAM, Civil No. 88-3302 (3d Cir. 1988).

WHEREFORE, Respondent prays that the instant petition be dismissed.

Respectfully submitted,

Keith A. Pesto

Keith A. Pesto
Assistant District Attorney
Counsel for respondent Fulcomer

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA

RECEIVED
JUL 1 1990

WAYNE PAUL BURKETT, :
Appellant :

V. : NO. 89-3118

THOMAS A. FULCOMER, et. al., :
Appellees :

BRIEF IN SUPPORT OF COMMONWEALTH'S REQUEST FOR DENIAL AND DISMISSAL OF APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS

The controlling case which all parties have knowledge as controlling is the seminal case of BARKER V. WINGO, 407 U.S. 514, 33 L.ed.2d 101, 92 Supreme Court 2182 (1972). The said case has established that there are four factors to be considered when considering an allegation of a violation of speedy trial and due process rights. The matter comes before this Court on a remand from the United States Court of Appeals which ordered this Court to consider an evidentiary hearing concerning those alleged violations of due process and right to speedy trial and sentencing.

The Appellee's would assert that under an analysis of the BARKER V. WINGO factors that the balancing test in such analysis will weigh in the favor of Appellee's and that there has indeed

APPENDIX 129

been no violation of Appellant's speedy trial, due process rights either with regards to either the trial itself or the sentencing subsequent thereto. The analysis of BARKER V. WINGO has been held over and has been found applicable to the sentencing phase and consequently the analysis of those four factors will determine if there has indeed been any violation. BURKETT V. CUNNINGHAM, 826 F.2d 1208 (3rd Circuit 1987).

The first factor to be considered is the length of the delay in each particular case. No specific length will necessarily mandate dismissal of an appropriate conviction. MITCHELL V. FAIRMAN, 750 F.2d 806 ( ). The Courts have found that depending upon the particular circumstances certain delays will not necessarily require dismissal while others may depending upon the particular circumstances. See U.S. V. FRAZIER, 678 F.Supp. 499 (Eastern District of PA 1986) affirmed 806 F.2d 255; SADLER V. SULLIVAN, 748 F.2d 820; GARCIA MONTALVO V. U.S., 862 F.2d 425 (C.A. 2, 1988); U.S. V. VOSCHANN, 869 F.2d 653 (C.A. 1, 1989).

Indeed until there is a delay which is presumptively prejudicial, there is no necessity to proceed until further analysis of the other factors under BARKER V. WINGO, Supra., U.S. ex rel V. JORDAN, 747 F.2d 1120 cert. den., FITZGERALD V. JORDAN, 105 S. Ct. 2120, 471 U.S. 1056, 85 L.Ed.2d 484 (C.A. IL 1984). Indeed where a defendant is at that time held on other charges for which he had

already been sentenced, then the fact that there may be a delay in final disposition regarding sentencing does not rise to the level of a presumption of prejudice. The Court must look at each case on its own merit.

In the case before this Court the Appellant Wayne Burkett was also awaiting sentencing on Criminal Action Numbers 140, 141 and 161 of 1981. The Appellant Burkett had been released on bail pending sentencing when he was arrested on the new charges to Criminal Action Number 284 of 1982.

Therefore, it cannot be said that the length of delay in disposition of Appellant Burkett's Post Trial Motions and Sentencing is attributable soley to the Criminal Action Number 284 of 1982, the matter now before this Court.

The length of delay must be considered in conjunction with the second factor of BARKER V. WINGO, which is the reason for the delay. As has already been indicated the bail which was holding Mr. Burkett in the Blair County Prison was attributable to a certain extent based upon the other incidents for which he was eventually found guilty at 140, 141 and 161 of 1981. The bail which was set would certainly have been set in view of those other matters and consequently Appellant Burkett's continual incarceration was as a result of those other incidents. Therefore the reason for the delay is attributable to Appellant Burkett himself.

Unintentional delays caused by what is well known to the appellate courts of Blair County's overcrowded court dockets are among the factors to be weighed less heavily than intentional delay, calculates the HAMPTON defense in determining whether a right to speedy trial or due process has been violated. STRUMP V. U.S., 412 U.S. 434, 93 Supreme Court 2260, 37 L.Ed.2d, 56 (1973); BARKER V. WINGO, 407 U.S. 514, 92 Supreme Court 2182, 33 L.Ed.2d 401 (1972). As has already been on other occassions demonstrated to the Court's in other counties the judicial situation can best be summed up in a well used cliche, "If I didn't have bad luck - I'd have no luck at all". The long list of liabilities and problems which Blair County has undergone certainly must be considered when examining the reasons for the delay.

Additionally, the Court must take into consideration if the Appellant himself has been responsible for the delay or its length. As has already been indicated, defendant's own actions dictated his continual incarceration. The fact that correct convictions were overturned subsequent due to violations of speedy trial and due proceprocess rights does not change the fact that twelve jurors in three previous criminal actions found the Appellant Burkett guilty of offenses and that those offenses kept Mr. Burkett continually incarcerated. The Commonwealth would note that subsequent to the trial of Criminal Action Number 284 of 1982, the matter before this

Court, that there were certain time periods attributable to Appellant Burkett.

Among these was Appellant Burkett's Motion for Change of Counsel. Said motion was filed on September 6, 1984 and delayed the determination of Post Trial Motions for approximately 5 to 6 monthmonths. Additionally there was a continuance of the sentencing hearing in order to accommodate the unavailability of new defense counsel. Additionally, a pre-sentence investigation was finally able to be ordered based upon the same unavailability of new counsel and such was submitted to the lower court approximately one month later.

Consequently those very matters which were done to protect Appellant Burkett and insure at his own request that his rights are protected served to contribute to the delay of which he now complains. As the courts have indicated, a delay of even 4-1/2 years will be found to not have been violated the sixth amendment when post trial motions were responsible for a portion of that time and additionally where no desire for disposition is made to the Court. MITCHELL V. FAIRMAN, Supra. Other reasons the Court may take into consideration in examining the reasons for the delay include the strength of the government's case, the importance of certain issues in the case which need to be decided, and also the seriousness of

the case. U.S. V. HERMAN, 576 F.2d 1139 (C.A. 5, 1978); U.S. V. LOUDHAWK, 474 U.S. 302, 106 Supreme Court 648, 88 L.Ed.2d 640 ( ).

Indeed the courts have found that state actions must be fundamentally unfair not merely undesirable in order to violate due process. Not every delay in the appeal of a case, even one which would be called inordinate violates due process. DONNELY V. DECHRISTOFORO, 416 U.S. 637, 94 Supreme Court 1868, 40 L.Ed.2d 431 (1974); BURKETT V. CUNNINGHAM, 826 F.2d 1208 (3rd Circuit 1987). Consequently where the state actions cannot be said to be vindictive or in bad faith then the reason for the delay must weigh less heavily upon the state.

The third factor in the BARKER V. WINGO analysis of course is that of the defendant's assertion of his right. With regards to the 29 month delay before Mr. Burkett was sentenced by Judge People's, Burkett filed two habeas corpus petitions - one with the Court of Common Pleas and one with the United States District Court for the Western District of Pennsylvania. Both petitions were denied, one a dismissal by the United States Magistrate and the other denied by another judge other than Judge People's of the Court of Common Plea's of Blair County. At that time, therefore, defendant asserted or attempted to assert his right just twice. In light of the defendant's other conduct in filing the aforementioned motions and also his other motions regarding request for new

counsel, (who eventually withdrew on his own volition from the case) those factors also are considered when viewing the defendant's assertion. The defendant cannot at one point attempt to delay matters and then at a subsequent point claim the delay as prejudice.

The last factor to be considered is that of prejudice to the defendant. As already indicated the defendant was incarcerated pursuant to and in conjunction with other charges. There must be a showing of actual prejudice to the defendant. In the case before this Court there were no motions to reduce bail and consequently it can only be perceived as someone complacent with the present situation. U.S. V. LOUDHAWK, Supra. There has been no showing up to this point of any assertion of any prejudice by the defendant and absent such the balancing test must weight in favor of the Appellee.

The interest prong of the BARKER analysis has been identified as thas three as applied to sentencing: one - prevention of oppressive incarceration pending appeal; two - minimization of anxiety and concern over those convicted waiting the outcome of their appeals; three - limitation of the possibility that a convicted persons grounds for appeal, and his or her defenses in case of reversal and a retrial, might be impaired. BURKETT V. CUNNINGHAM, 826 F.2d 1288, (3rd Circuit 1987) citing RHEUARK V. SHAW, 628 F.2d

297, 303 note 8 (5th Circuit 1980), cert. den., 450 U.S. 931, 101 Supreme Court 1392, 67 L.ed.2d 365 (1981). There has been no showing to this point of any real prejudice to Appellant and in view of the Appellate record which has been established. It is quite obvious that the conviction itself has been affirmed on each and every level. The trial in this case came down to the testimony of a single witness, that being the victim in this case. It was her testimony and her testimony alone that can be said to have convicted Appellant Burkett. The defense at trial was that of misidentification. The victim picked the wrong person. The defendant presented the defense of an alibi consisting of himself and various other members of his family and friends who testified as to his whereabouts. Quite clearly the jury chose to believe the victim and rated her credibility above that of Appellant Burkett and his witnesses. Therefore in view of the trial's form, there can be no doubt than at appeal would have been fruitless and that consequently the anxiety and concern of Appellant Burkett was at a minimum.

Therefore, in consideration of all the factors of BURKETT V. WINGO, Supra., and its modern prodigy, the balancing test must weigh in favor of the Commonwealth. If the Court should decide that the balancing test does not weigh in favor of the Appellee's then the appropriate remedy should be remand for a retrial and not dismissal.

The Commonwealth would finally note that in accord with the previous federal court order denying relief on the condition that Burkett be sentenced within sixty days that this judge, that being Judge Thomas Peoples, Jr., did indeed comply with such order. Consequently, Appellant Burkett's request for relief should be denied and dismissed.

Respectfully submitted,

David C Gorman

David C. Gorman
Asst. District Attorney

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3118

RECEIVED
AUG - 1990
PUBLIC DEFENDER

WAYNE PAUL BURKETT

vs.

THOMAS A. FULCOMER, Superintendent, et. al.
Answering Respondent BLAIR COUNTY DISTRICT ATTORNEY

Wayne P. Burkett, Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-1397)

Submitted Under Third Circuit Rule 12(6)
June 26, 1990
Before: SLOVITER and MANSMANN, Circuit Judges, and FULLAM, District Judge.*

(Filed AUG 7 1990)

OPINION OF THE COURT

MANSMANN, Circuit Judge.

Wayne Burkett, a state prisoner, raises issues of constitutional violations concerning the delay in the disposition of his post trial motions and imposition of sentence in this

* Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvnaia, sitting by designation.

APPENDIX 13a

appeal from a denial of a petition for writ of habeas corpus. Both the magistrate and the district court addressed the merits of Burkett's petition and concluded that his petition was without merit. Because we find that the district court failed to address several issues, we will remand to the district court for proceedings consistent with this opinion.

I.

On April 11, 1982, a young man identifying himself as Jim Costlow entered Bernice Hummel's house against her wishes and refused to leave when asked. When she tried to leave by the back door, he locked the door and began to describe the sexual acts he wanted her to perform with him. He took a knife from a drawer in her kitchen and threatened to slit her throat if she did not cooperate. Eventually, Mrs. Hummel escaped and ran to a neighbor's house. She described her assailant to the police when they arrived. A suspect, Wayne Burkett, was apprehended and later identified by Mrs. Hummel as her assailant.

Burkett was tried in the Blair County Court of Common Pleas (at No. 284 of 1982) and was convicted on January 28, 1983 of burglary, attempted rape, terroristic threats, simple assault and reckless endangerment. Burkett filed post-conviction motions which were not acted upon until May 8, 1985. In June, 1985, Burkett was sentenced to sixteen to thirty-two years incarceration and is presently at the State Correctional Institution at Huntingdon, Pennsylvania.

In August, 1985, Burkett filed two petitions for writ of habeas corpus raising claims of speedy trial and due process violations in relation to this conviction as well as with respect to other unrelated offenses. In a published opinion, we held that the right to a speedy trial runs through sentencing and the right to due process guarantees against delays in trial through sentencing and throughout direct appeal. Burkett v. Cunningham, 826 F.2d 1208, 1220-21 (3d. Cir. 1987).[1] As to the issues on appeal here, we decided that they had not been exhausted before the state courts and affirmed the district court's dismissal of the writs to allow the state courts to act. 826 F.2d at 1218. After our decision in Burkett was filed, the Pennsylvania Supreme Court denied allocatur by order entered on January 5, 1988.

In June of 1989, Burkett filed another petition for writ of habeas corpus and requested appointment of counsel. Burkett alleged ineffective assistance of counsel on the basis of: 1) defense counsel eliciting highly prejudicial testimony from a government witness concerning Burkett's assertion of his right to remain silent; 2) failure to object to the trial court's instructions to the jury on alibi defense; 3) failure of counsel

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1. We remanded to the district court for issuance of the writ and an order discharging Burkett from his convictions on charges unrelated to the current appeal (Blair County Crim. Action Nos. 140 & 141). 826 F.2d at 1228. At No. 161, we found that there was no speedy trial violation because Burkett was promptly sentenced, but held that the delay in processing his state court direct appeal arguably violated due process, and remanded to the district court for factual findings on prejudice, and application of the Barker v. Wingo, 407 U.S. 514, 530 (1972) factors. Burkett was not released from custody, however, because of his current sentence.

to move to suppress line-up evidence; 4) failure to move to suppress in-court identification; 5) failure to preserve speedy trial and due process claims based upon delay between conviction and sentencing and delay in processing state court appeal; 6) insufficient evidence to prove reckless endangerment; and 7) insufficient evidence to prove the element of specific intent to commit a felony (rape) necessary to prove burglary.[2]

After the Commonwealth filed its response to Burkett's petition, the United States Magistrate issued a Report and Recommendation that the petition be dismissed and the certificate of probable cause be denied on the merits. Although it appeared that Burkett had failed to exhaust state remedies on one of the ineffective assistance of counsel claims, i.e., the speedy trial and due process issues, the magistrate concluded that it was the result of an error on Burkett's part in couching the claim in terms of ineffective assistance of counsel. The magistrate, however, treated the claim as though it alleged ineffectiveness

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2. Included within Burkett's allegation that his speedy trial and due process rights had been violated by the protracted delay in sentencing and hearing the appeal, was the statement

> (It should be pointed out that petitioner had voiced his fears in the U.S. Court of Appeals for the Third Circuit that were that court to allow Blair County to sentence petitioner, the Petitioner would be subject to retaliation in the nature of a more severe sentence. . . .)

Appendix at 488. We note that this issue was not presented to the state courts and therefore is not exhausted. Nonetheless, we would consider the issue waived since Burkett did not follow through with the issue in his objections to the Magistrate's Report and Recommendation.

of counsel and regarded the alleged delay as an error of state law rather than treating it as a substantive constitutional claim of violations of due process and speedy trial.[3] Consequently, the magistrate did not resolve the issue as to whether Burkett was prejudiced by the undue delay.

In response to the magistrate's Report and Recommendation, Burkett moved to amend his petition to drop the ineffective assistance of counsel language relating to his due process and speedy trial claims and to amend the petition to claim that his constitutional rights to a speedy trial and due process of law were violated by virtue of the inordinate delay in disposing of post-trial motions, imposing sentence and processing petitioner's appeal. The district court, while not ruling explicitly on the requested amendment, denied, inter alia, the petitioner's objections to the magistrate's Report and Recommendation in which the proposed amendment was contained. Thereafter, the district court adopted the recommendation of the magistrate and, "upon independent review of the petition and the record, from which it appear[ed] that the petitioner's allegations [were] without merit," the district court denied the petition.

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3. The magistrate relied on Smith v. Zimmerman, 768 F.2d 69 (3d Cir. 1985) to support his finding that failure to raise certain claims in state court proceedings is an error of state law procedure which does not warrant habeas relief. See Smith, 768 F.2d at 73. While Smith does stand for the rationale that the mere error in failing to follow state law procedures does not warrant habeas relief, it follows from the reasoning that a mere error of state procedure does not violate due process. Id. The right to a speedy trial and the right to due process, such as Burkett's claims at issue here, however, are constitutionally guaranteed.

Burkett appealed and requested the appointment of counsel. We granted Burkett's request for a certificate of probable cause and appointed counsel.

II.

Although the magistrate, and later the district court, properly recognized that Burkett's speedy trial and due process claims were not ineffective assistance of counsel claims for purposes of exhaustion, they nonetheless erred by addressing the claims as ineffectiveness of counsel. Moreover, the district court's denial of Burkett's motion to amend his petition to include the exhausted claim with respect to speedy trial and due process violations amounts to an abuse of discretion in light of the policy in Rose v. Lundy, 455 U.S. 509 (1982) that a prisoner should have the choice of amending his petition to include only exhausted claims.

Consequently, neither the magistrate nor the district court addressed the issue of whether the undue delay in the state courts violated Burkett's right to a speedy trial and due process. Whether this delay resulted in prejudice to Burkett remains for the district court to address on remand. In order to give guidance to the court, we note that the issue of whether a speedy trial or due process violation has occurred due to delay in the post-verdict context can be resolved by application of the four factors identified by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). "We identify four such factors: Length of

delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker, 407 U.S. at 530. The Court noted, however, that "none of the factors identified above [are regarded] as a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Id. at 533. They must, instead, be examined together in light of all the circumstances where the key is in identifying that the accused's right to a speedy trial is constitutionally affirmed. Id.

Inasmuch as the district court did not address Burkett's speedy trial and due process claims, we must remand to the court for appropriate findings as to whether the 29 month delay between the conviction and sentencing violated Burkett's speedy trial or due process guarantees, and whether the two year, five month delay in addressing his state court appeal constituted a violation of due process.

III.

The district court erred by failing to permit Burkett to amend his complaint and by not addressing Burkett's claims of violations of due process and the right to a speedy trial and sentencing. Due to the long delay Burkett has already experienced, we shall issue the mandate forthwith and direct that an evidentiary hearing take place within thirty (30) days of the issuance of our mandate.

TO THE CLERK:

Please file the foregoing opinion.

Carol Lee Mansmann
Circuit Judge

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
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September 10, 1990

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SEP 1 1 1990
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Re: Burkett vs. Fulcomer, et al.
No. 89-3118

Dear Counsel:

Enclosed herewith is copy of order filed today amending the opinion filed August 7, 1990 in the above-entitled case .

Very truly yours,

Sally Mrvos/cl

Clerk

Enclosure

cc: DS on 9-12-90 Jen

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3118

RECEIVED
SEP 1 2 1990
PUBLIC DEFENDER

WAYNE PAUL BURKETT

vs.

THOMAS A. FULCOMER, Superintendent,
et. al.
Answering Respondent BLAIR COUNTY
DISTRICT ATTORNEY

Wayne P. Burkett,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-1397)

Submitted Under Third Circuit Rule 12(6)
June 26, 1990
Before: SLOVITER and MANSMANN, Circuit Judges, and
FULLAM, District Judge.*

ORDER AMENDING OPINION

IT IS HEREBY ORDERED that the not for publication opinion in the above-captioned matter, filed on August 7, 1990, is hereby amended as follows:

Page 7 - Please add the following sentences to the last paragraph before Section III. of the opinion:

* Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvnaia, sitting by designation.

We make no comment on the merits of all the other issues raised by Burkett in his petition. If Burkett is dissatisfied with the district court's disposition of his speedy trial and due process claims after remand, he may raise all of his exhausted claims together in a new petition for certificate of probable cause.

BY THE COURT,

Carol Los Mansmann
Circuit Judge

Dated: SEP 10 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RECEIVED
JUN 10 1991
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF PENNSYLVANIA

NO. 91-3040

WAYNE PAUL BURKETT,
Appellant

V.

THOMAS A. FULCOMER, ET. AL.,
Appellees

APPELLEE'S BRIEF IN SUPPORT OF THE COMMONWEALTH'S REQUEST FOR DENIAL AND DISMISSAL OF APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS

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APPENDIX 14a

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STATEMENT OF JURISDICTION

The Appellees have no objection to the statement of jurisdiction as contained in Appellant's brief.

STATEMENT OF ISSUES

Whether Burkett's rights as per the due process and speedy trial guarantees of the constitution were violated by the delay in disposing of his post-trial motions and imposing sentence?

SUGGESTED ANSWER: No.

STATEMENT OF THE CAS.

Appellees have no objection to the statement of the case as found in Appellant's brief.

STATEMENT OF FACTS

Complaint was filed against the Appellant Wayne Paul Burkett on April 12, 1982 charging him with Criminal Attempt Rape, Burglary, Recklessly Endangering Another Person, Terroristic Threats, Simple Assault, and Harassment. A preliminary hearing was held on April 22, 1982 and all charges were held for Court. Informations regarding the matters were filed on or about June 18, 1982.

The Public Defender's Office who represented Mr. Burkett from the time of the preliminary hearing onward filed a Petition for Change of Venue on or about September 2, 1982. On or about October 1, 1982 the District Attorney's Office filed a Petition for Extension of Time pursuant to Rule 1100. On or about September 29, 1982 a Notice of Alibi Defense was filed by the Public Defender's Office. On or about October 20, 1982 the Public Defender's Office filed a Petition for Dismissal of Charges pursuant to Rule 1100. The Commonwealth then filed a Petition to Amend the Petition for Extension of Time pursuant to Rule 1100 on or about October 20, 1982.

On November 5, 1982 the trial in this matter was continued by the Public Defender's Office upon the request of Attorney John Woodcock, the Chief Public Defender, who was then assigned to defend Wayne Burkett and who was unavailable to try the case as he was involved in a murder trial in another courtroom.

On December 29, 1982 the matter was brought before the Court on a Petition for Change of Venue due to the Public Defender's Office not

having transported Wayne Burkett from Bedford County was continued. Trial was held on January 29, 1983 and the jury returned a verdict of guilty as to all charges against the defendant, Wayne Paul Burkett. On January 31, 1983 the defendant was found guilty of Harassment by the trial judge.

Post Trial Motions were filed by the Public Defender's Office on February 2, 1983. Prior to trial on this matter on January 4, 1983 the trial court found there was cause for extension of time of Rule 1100 and so granted the Commonwealth an extension until the last day of the January 1983 session. Subsequent to said matters the defendant filed a petition indicating that trial counsel was ineffective. Said matter was filed on or about September 3, 1984. Hearing was scheduled on January 23, 1985 with regards to the argument on Post Trial Motions at which point the defendant Wayne Paul Burkett indicated that he did not desire representation by Attorney Woodcock, but desired representation by another attorney. Pursuant to such at that time the hearing was continued for another date with regards to the ineffective assistance of counsel.

Said hearing was conducted on or about April 1, 1985 and on April 2, 1985 the said petition was dismissed. Said matter was to be scheduled for sentencing.

Defendant filed an appeal from the denial of the petition with regards to ineffective assistance of counsel on or about April 9,

1985. Said appeal was denied by the Superior Court on April 22, 1985.

On May 8, 1985 Judge Thomas G. Peoples denied the Post Trial Motions of the Public Defender's Office on behalf of the defendant Wayne Burkett and ordered that sentencing was to be scheduled.

The defendant filed a Petition for Writ of Habeas Corpus in the Court of Common Pleas of Blair County to not only 284 of 1982, but also 140, 141, and 161 of 1981. Pursuant to hearing having been held said petition was dismissed on June 6, 1985.

Sentencing was scheduled for June 17, 1985 and was continued to June 13, 1985 upon motion of the Public Defender's Office, John Woodcock, Jr., Esq. as he was involved in a trial in the Western District of Pennsylvania and was therefore unavailable. Sentencing was continued to a date to be set by the Court Administrator. On June 24, 1985 the defendant was sentenced as to Criminal Action Number 284 of 1982. On or about June 27, 1985 the Public Defender's Office filed a Motion for Reconsideration of Sentence which was denied by the trial judge on July 3, 1985.

The verdict and sentence were appealed on or about July 18, 1985 by the Public Defender's Office on behald of Wayne Burkett.

Pursuant to a request by the trial court the Public Defender's Office filed a concise statement of all matters complained of with regards to the aforementioned appeal on August 13, 1985.

Burnett's

Subsequent to this on May 7, 1986 a Petition to Withdraw was filed by the Public Defender's Office which petition was granted on the same date. On May 14, 1986 Attorney Frederick Gieg, Jr. of Altoona, Pennsylvania was appointed to represent Wayne Burkett. Approximately two months after that date an Opinion was filed by the trial court on July 16, 1986.

On September 11, 1986 Attorney Frederick Gieg, Jr. filed a Motion to Withdraw from representation of the defendant Wayne Burkett. Said matter was appealed to the Superior Court with the Superior Court affirming the Order of the trial court on January 12, 1987. A new briefing schedule was provided on July 22, 1986 with the defendant's brief being filed on August 28, 1986 and the Commonwealth's brief on September 29, 1986.

Attorney Gieg filed a Petition to Withdraw before the Superior Court on November 10, 1986 with the Superior Court denying said withdrawal on December 15, 1986. As indicated previously the Superior Court affirmed the decision of the trial court on January 12, 1987.

Reargument was denied on February 26, 1987. Petition for Allocatur was filed on March 18, 1987 with a motion to advance the same filed by the defendant on August 27, 1987. The Supreme Court denied allocatur on December 28, 1987. On or about June 27, 1988 a Petition for Writ of Habeas Corpus was filed with an Order from U.S. Magistrate Mitchell requiring an answer from the Appellee's, that being the

Blair County District Attorney's Office. On July 11, 1988 an amended Order was filed by U.S. Magistrate Mitchell allowing Appellant Burkett to file additions to the record. On July 14, 1988 a petition was filed for appointment of counsel. On July 14, 1988 a subsequent Petition for Writ of Habeas Corpus was filed with the Commonwealth's answer following.

On August 15, 1988 the Appellant Burkett filed a traverse to the return of respondent's answer to petition. The Commonwealth filed an amended answer to the traverse on September 27, 1988 Appellant Burkett filed a traverse to return and a response to the amended answer filed by the Appellees along with a supplemental traverse to the return. On Septemer 30, 1988 Appellees filed an answer to supplemental traverse to the return with a reply to the response to supplemental traverse to return filed by the Appellant on October 11, 1988.

Pursuant to such on December 9, 1988 the magistrate filed a report and a subsequent Order denying the request for a Writ of Habeas Corpus.

On December 15, 1988 Appellant Burkett filed a Petition for Extension of Time to file objections and on December 19, 1988 the Appellant filed a Petition to Amend his Petition for Writ of Habeas Corpus. On the same date Appellant filed objections to the magistrate's report and supplemental objections on December 28, 1988.

Appellant filed a Petition for Reconsideration on January 19, 1989. On January 31, 1989 the Appellees filed a letter/answer to Petitioner's Petition for Reconsideration to the United States District Court, Judge Webber. On February 15, 1989 Judge Webber filed a corrected Order, an Order denying reconsideration.

On February 21, 1989 Appellant filed a notice of appeal and a petition to specify parts of the record. Said appeal was docketed on March 1, 1989. On March 9, 1989 Appellant applied for a Certificate of Probable Cause and Appointment of Counsel on the same date. On March 17, 1989 a letter was sent by the Clerk acknowledging receipt of the appeal. On January 8, 1990 the Appellees filed a Response to the Application for Certificate of Probable Cause. On February 23, 1990 the Third Circuit for the Court of Appeals granted probable cause and established a briefing schedule. On March 1, 1990 the Third Circuit filed an amended Order further defining the claims. Eventually on August 7, 1990 the Third Circuit Court of Appeals filed an Opinion remanding the matter to the district court for an evidentiary hearing regarding the claims of denial of constitutional rights in regards to the speedy trial and due process clauses of the federal constitution. The Appellant filed a Motion for Recall of Mandate on August 17, 1990 along with a Petition for Rehearing. The Third Circuit denied the same and hearing was held before U.S. Magistrate Mitchell with regard to the Order of August 7, 1990.

On October 17, 1990 evidence was taken and an Opinion was filed by U.S. Magistrate Mitchell on October 18, 1990 denying the request for

Writ of Habeas Corpus and Certificate of Probable Cause. Subsequent thereto an appeal was taken to the Third Circuit Court of Appeals and the matter is now before this court.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no other cases pending.

STATEMENT OF STANDARD OF REVIEW

The standard of review is a question of law, and therefore is plenary.

ARGUMENT

The Commonwealth would agree and adopt the opinion entered by United States Magistrate Robert C. Mitchell of October 18, 1990 which was subsequently adopted as the opinion of the United States District Court for the Western District of Pennsylvania.

The Appellant Wayne Paul Burkett attempts to raise once again the issues regarding ineffective assistance of counsel, insufficiency of the evidence in regards to the intent to commit Rape and the offense of Recklessly Endangering Another Person. As the Court of Appeals for the Third Circuit has already indicated the only issue for the magistrate was the question of the delay in disposing of the Appellant's Post Trial Motions, imposing sentence and processing his appeal. Specifically the magistrate was to hold the evidentiary hearing only with regard to the alleged speedy trial and due process violations. As this was the only purpose for which the hearing was held the Appellees will only address those specific issues. The Appellees would rely upon the Magistrate's Opinion already filed concerning those other matters previously before this court.

While the Appellees adopt the opinion of the magistrate, they would additionally assert these other grounds as basis for denial of the Appellant's request.

Under BARKER V. WINGO, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972), the first factor is the length of delay. No specific length will necessarily mandate dismissal of an otherwise appropriate

conviction. U.S. ex. rel. MITCHELL V. FAIRMAN, 750 F.2d 806 (7th Cir. 1984). The courts have found that, depending upon particular circumstances, certain delays will not necessarily require dismissal, while others may, depending upon the particular circumstances. See U.S. V. FRAZIER, 678 Fed. Supp. 499 (E.Dt. Pennsylvania 1986), affirmed 806 F.2d. 255; SADLER V. SULLIVAN, 748 F.2d 820 (1984); U.S. V. VOSCHANN, 869 F.2d 653 (1st Cir., 1989).

At the time the defendant was awaiting sentencing on Criminal Action Numbers 140, 141 and 161 of 1981, he was released on bail. At that time he was arrested on the new charges to Criminal Action Number 284 of 1982. Consequently the defendant was brought before the Court of Common Pleas of Blair County upon a motion to revoke bail, which was filed by the District Attorney's Office. While the court did not revoke bail, it did agree to an increase of bail as to 284 of 1982. Prior to this point the defendant had instructed his sister to withdraw the bail which had been posted to Criminal Action Numbers 140, 141, and 161 of 1981. Consequently even if the defendant had been able to make bail on 284 of 1982 he would have remained incarcerated based upon the withdrawal of bail by his sister. (Hearing Transcript pages 150 - 153, before District Magistrate Robert Mitchell on October 17, 1990.)

As the magistrate held the delay was attributable to not only Criminal Action Number 284 of 1982 but also Criminal Action Numbers 140, 141, and 161 of 1981.

The second factor is the reason for the delay. As has already been indicated the bail which was holding the Appellant was attributable not only to 284 of 1982 but also to the other criminal action numbers for which he awaited sentencing. Indeed the Appellant had the bail withdrawn so that he could receive credit for all the time which he had served or would serve in the Blair County Prison. Much as the magistrate indicated, the delay was attributable to Wayne Burkett as much as the Commonwealth.

The magistrate indicated that the delay was, in part, caused by the motions filed by the Appellant. Said motions unduly delayed the disposition of the Appellant's post trial motions. In conjunction the Appellant was incarcerated as a result of his own doing, that being the directive from him to his sister to withdraw the bail as was revealed during the hearing before District Magistrate Mitchell of October 17, 1990. Therefore, the prejudice to the defendant with regards to his incarceration was part of his own device in order to attempt to get credit for all time that he would serve in Blair County Prison prior to his being sentenced. Where the reason for the delay is attributable both to the Appellant and the Commonwealth, as concluded by Magistrate Mitchell, the prejudice of which the Appellant complains is his own responsibility. As the magistrate indicated, the prejudice, if any experienced by the Appellant, cannot justify relief.

Not every delay in the appeal of a case, even one which can be called inordinate, violates due process. DONNELLY V. DECHRISTOFORO,

416 U.S. 637, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974). Consequently where the state actions cannot be said to be vindictive or in bad faith the reason for the delay must weigh less heavily upon the state.

The BARKER V. WINGO, Supra. analysis has been translated to the area of post trial motions and sentencing thereto. BURKETT V. CUNNINGHAM, 826 F.2d. 1288, (3rd Cir. 1987) citing RHEUARK V. SHAW, 628 F.2d 297 (5th Cir. 1980), cert. den. 450 U.S. 931, 67 L.ed.2d. 365, 101 S.Ct. 1392 (1981). The factors to be considered are 1) prevention of oppressive incarceration pending appeal; 2) minimization of anxiety over concern of those convicted awaiting the outcome of their appeals; 3) limitation of the possibility that convicted persons' grounds for appeal and his or her defenses in case of reversal on a retrial might be impaired.

The Appellee would submit that the oppressive incarceration was part and parcel of the Appellant's own doing and therefore cannot be found here. The second factor minimization of anxiety and concern of the Appellant cannot be found here where the Appellant has his bail withdrawn so that he can claim as much credit for time served when he is sentenced.

Finally, the impairment either of retrial cannot be found here where the previous trial was transcribed and, as the magistrate indicated, said testimony is a matter of record. (Magistrate's opinion pages 11 and 12).

Consequently the Appellees would urge this Court as the Appellees have done to adopt the report and opinion of Magistrate Mitchell and to deny and dismiss the Appellant's request for a Writ of Habeas Corpus. If in the event the Third Circuit Court of Appeals determines that there is some merit to the Appellant's request and argument, the Appellee's would submit that the appropriate remedy is retrial and not release. BURKETT V. CUNNINGHAM, Supra.

CONCLUSION

The Appellees request this honorable court to affirm the recommendation of the district magistrate and order of the district court. Absent denial the Appellees would indicate that retrial be ordered.

Respectfully submitted,

David C. Gorman

David C. Gorman, Esq.
Asst. District Attorney

CERTIFICATE OF MEMBERSHIP IN THE BAR

I, David C. Gorman, Assistant District Attorney of Blair County, hereby certify that I am a member of the bar of this court.

David C. Gorman, Esq.

I, William J. Haberstroh, District Attorney of Blair County, hereby certify that I am a member of the bar of this court.

William J. Haberstroh, Esq.

WAYNE PAUL BURKETT, Appellant	:	IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
V.	:	
THOMAS A. FULCOMER, ET. AL., Appellees	:	NO. 91-3040

. . .:. . .

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing documents upon Thomas S. White, Esq., Federal Public Defender, Counsel for Wayne Paul Burkett, the Appellant, via United States Certified Mail, which satisfies the service requirements of Pa. R.A.P. 121.

Thomas S. White, Esq.
Federal Public Defender
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Date: June 6, 1991

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Filed December 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RECEIVED
DEC 24 1991
FE... PUBLIC DEFENDER
...T OF PENNSYLVANIA

No. 91-3040

WAYNE PAUL BURKETT, K-8595

vs.

THOMAS A. FULCOMER, Superintendent, et al.
Answering Respondent BLAIR COUNTY
DISTRICT ATTORNEY

Wayne Paul Burkett,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 88-01397)

Argued
August 8, 1991
Before: MANSMANN and ALITO, *Circuit Judges*,
and NEALON, *District Judge*.*

(Filed December 20, 1991)

*Honorable William J. Nealon of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

APPENDIX 159

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COUNSEL FOR APPELLEES

OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

Once again the saturated dockets and the apparent strain on judicial resources in Blair County, Pennsylvania, give cause for us to examine whether a state prisoner's constitutional rights to a speedy trial and due process of law have been violated by delays in post-conviction proceedings.[1] Applying the test set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514

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1. In earlier matters, the dilemmas caused by the backlog of criminal cases in Blair County were described. *See Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987), *Schandelmeier v. Cunningham*, 819 F.2d 52 (3d Cir. 1986), *Hooper v. Cunningham*, Civ. No. 84-2818, 1985 W.L. 390 (W.D. Pa. Feb. 21, 1985), and *Switzer v. Huyett*, 507 F. Supp. 247 (W.D. Pa. 1980).

(1972), to evaluate whether delays in the criminal justice system rise to the level of a constitutional deprivation, we find that the petitioner has established both Sixth Amendment and due process violations. We will, therefore, remand the matter to the district court with instructions to grant the writ conditionally, imposing the remedy we have fashioned to alleviate the specific prejudice suffered.

I.

The procedural posture of this case is of paramount concern, and in fact, we have previously chronicled the travails of the petitioner, Wayne Paul Burkett. *See Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987) (*Burkett I*).

Burkett was arrested on April 13, 1982 for the offenses of burglary, criminal attempt (rape), terroristic threats, simple assault, recklessly endangering another person and harassment, and was indicted at Criminal Action No. 284, Blair County, Pennsylvania. Upon his arrest, Burkett was incarcerated at the Blair County Prison.

On October 1, 1982, the District Attorney's Office of Blair County requested a continuance of the trial on these charges, which was granted. Burkett's motion to dismiss for lack of timely prosecution, filed on October 15, 1982, was denied. A jury trial eventually commenced before the Honorable Thomas G. Peoples, Jr. on January 26, 1983. On January 28, 1983, the jury convicted Burkett of the felonies and misdemeanors charged. Three days later Judge Peoples found him guilty of the summary offense of harassment.

Several days later, in February of 1983, Burkett timely filed post-trial motions, but all post-trial

activity came to a standstill.[2] Therefore, on March 12, 1984, more than one year after conviction, Burkett's counsel filed a petition for writ of habeas corpus with the Court of Common Pleas of Blair County, challenging Burkett's custody and alleging that the trial court's failure to sentence Burkett violated his speedy trial and due process rights.

Burkett then began an active course of correspondence with his attorney and court personnel, expressing dismay over the delay in disposition of his post-trial motions. To punctuate his dissatisfaction, on September 6, 1984, Burkett filed a *pro se* application for an evidentiary hearing to raise and preserve the issue of his counsel's ineffectiveness in failing to pursue an expeditious resolution of his claims of error. He also sought the appointment of new counsel.

Seven months after the filing of the state habeas corpus petition, and more than 28 months after Burkett's conviction, the Honorable R. Bruce Brumbaugh of the Court of Common Pleas of Blair County held a hearing on the habeas petition on October 11, 1984. At the conclusion of the hearing, Judge Brumbaugh announced that he would render a decision in one week. Eight weeks later, however, when a decision was not forthcoming as represented, Burkett filed for relief

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2. Apparently the trial transcript was not filed until August 18, 1983 even though the trial itself only encompassed three days. Also, no briefing schedule concerning the post-trial motions was established.

before the Pennsylvania Superior Court on December 12, 1984.[3]

Burkett's post-trial motions were eventually scheduled for a hearing on January 23, 1985 – two years after they had been filed. Burkett objected to proceeding with argument, however, because his motion alleging counsel's ineffectiveness and requesting appointment of new counsel had not yet been scheduled for a hearing. Judge Peoples postponed argument and set a hearing on counsel's ineffectiveness. On April 1, 1985, Judge Peoples conducted a hearing on Burkett's claim of ineffectiveness which included claims raised in a second motion concerning the quality of his counsel's representation on the felony and misdemeanor charges. Both motions were denied on April 2, 1985. Although Burkett appealed the denials to the Pennsylvania Superior Court, they were quashed "*sua sponte* as interlocutory." App. at 284.

Approximately two months prior to the state court hearing on counsel's effectiveness, Burkett began to seek relief via the federal system. In February of 1985, Burkett filed a writ of mandamus in Blair County in an attempt to compel his defense counsel to file for habeas relief in the federal courts. When counsel failed to initiate a federal proceeding, on March 28, 1985, Burkett filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Pennsylvania, alleging a violation of his speedy

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3. Relief was denied by the Superior Court on August 28, 1985 and by the Pennsylvania Supreme Court on April 24, 1986.

trial rights occasioned by the delay in sentencing in his three pending Blair County cases.[4] After a hearing, in a Report and Recommendation to the district court, the United States Magistrate Judge assigned to the matter recommended that exhaustion of state court remedies be excused because of the length of the delay. The magistrate judge then conducted a four-part *Barker v. Wingo* analysis, the test set forth by the United States Supreme Court to evaluate speedy trial claims attributable to delay. 407 U.S. at 517-38. He thus examined (1) the length of the delay, (2) the cause of the delay, (3) the defendant's assertion of the right, and (4) the resulting prejudice to the defendant, and concluded that all four factors were to be weighed against the government. Specifically as to prejudice, the magistrate judge found that Burkett suffered prejudice since the length of the delay presupposed "some loss" to the petitioner. *Burkett v. Cunningham*, No. 85-769 (W.D. Pa. 1985), Magistrate's Report and Recommendation at 8; App. at 2279. Although positing that an unconstitutional delay of speedy trial rights had occurred, the magistrate judge did not recommend

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4. These three cases involved separate and unrelated incidents and trials. In addition to the conviction in January of 1983, Burkett had been convicted by a Blair County jury in November of 1981 of counts of burglary, theft, receiving stolen property, terroristic threats and corruption of minors. Later, on January 20, 1982, Burkett was found guilty of the felonies of rape, involuntary deviate sexual intercourse, terroristic threats, and aggravated assault; and of the misdemeanors of unlawful restraint, indecent exposure, terroristic threats, recklessly endangering another person, and indecent assault. The outcome of these cases is documented in our *Burkett I* opinion.

that any affirmative action be taken because "the Court of Common Pleas [of Blair County] has apparently ordered that a hearing [on the post-trial motions] be scheduled." He opined that "it would appear appropriate to withhold any action, to permit the Court of Common Pleas to promptly resolve this matter." App. at 2279-80. Thus, on May 15, 1985, the magistrate judge recommended denial of the writ, conditioned on Judge People's imposing sentence on Burkett within 60 days. The district court adopted the magistrate judge's recommendation and Burkett appealed. We denied Burkett a certificate of probable cause but did so without prejudice to his filing a new petition with the district court if Burkett was not sentenced within the time constraints dictated by the district court.

Indeed, in the interim, on May 8, 1985, Judge Peoples denied Burkett's post-trial motions. His state habeas petition was likewise denied on June 6, 1985. Then, on June 24, 1985, 29 months after his conviction and 38-1/2 months from arrest, Burkett received the maximum sentence permitted for the offenses of which he had been convicted at No. 284 – 16 to 32 years of imprisonment. No credit was given for time served, although Burkett had remained incarcerated in various county prisons in Western Pennsylvania since April 13, 1982.

On June 24, 1985, Judge Peoples filed an opinion in support of his sentence, but no opinion was filed at that time regarding the denial of the post-trial motions. According to Pennsylvania appellate practice, the opinion explaining the reasons for the denial should have been filed by September 1, 1985, 40 days from the July 23,

1985 filing of the appeal by Burkett. Pa. R. App. P. 1925(a), 1931(a). Judge Peoples filed his opinion on July 16, 1986, in excess of ten months late. The record was transmitted approximately one week later.

While awaiting a written explanation of the denial of his post-trial motions, Burkett filed two federal petitions for relief in August of 1985. Burkett reasserted his arguments concerning the post-conviction delays in all three of his cases and also alleged that the prior federal court order directing Judge Peoples to sentence him within 60 days exposed him to an extremely retaliatory sentence. Counsel was appointed from the Federal Public Defender's Office and an evidentiary hearing was held before a United States Magistrate Judge. On December 24, 1985, the magistrate judge recommended dismissal for want of exhaustion. The district court adopted the magistrate judge's recommendation and Burkett filed an appeal to this court, resulting in *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987).

In *Burkett I*, we scrutinized the two habeas appeals concerning Burkett's three Blair County convictions to decide whether post-conviction delays warranted granting of the writ. We held generally that the Sixth Amendment guarantee to a speedy trial spans from arrest to sentencing and that due process guarantees against trial delays apply to the direct appeal phase. 826 F.2d at 1220, 1221. As to the first conviction, since Burkett still was not sentenced for over five and one-half years, we held that this egregious delay violated Burkett's speedy trial right and concluded that discharge was the appropriate remedy. On the second proceeding, which encompassed two

separate convictions with a combined delay of over five years, we agreed with the district court that Burkett was not entitled to relief under the speedy trial guarantee of the Constitution but concluded that the delay in processing the state court direct appeal arguably violated due process and remanded this matter to the district court for factual findings on prejudice. *Id.* at 1226-27.[5]

With regard to the convictions at issue here, although we discussed the delay attributable to that action, because Burkett's appeal to the Pennsylvania Superior Court had been decided on January 12, 1987 and his allocatur petition to the Pennsylvania Supreme Court was pending, we affirmed the district court's dismissal of the writ for failure to exhaust state remedies and did not reach the constitutional issues. We stated that

> Burkett's direct appeal now appears to be proceeding normally. . . . [I]t is not disputed that the case is now before the Pennsylvania Supreme Court. Under these circumstances, we believe that it is appropriate to allow that court, in the first instance, to hear petitioner's claim.

Id. at 1218.

Unfortunately, the delay which permeated the sentencing phase of Burkett's drama continued in

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5. It is not clear from the record precisely what transpired after remand to the district court. The district court docket entries reveal that on April 13, 1988 an order was entered granting the writ of habeas corpus and Burkett was discharged from custody on this conviction. Also, Burkett testified that as a result of a federal habeas proceeding he was eventually credited for the prison time served post-arrest. App. at 1459. We assume, therefore, that this remedy resulted from the above-mentioned remand proceeding.

the state appellate process. A portion of the trial court record was transmitted to the Superior Court on January 2, 1986, four months late by reference to the Pennsylvania appellate rules. Then, in order to preserve his allegation of ineffectiveness of counsel, Burkett renewed the request for different counsel previously denied by the Blair County Court. The Superior Court granted the request on April 4, 1986, remanding the case to the jurisdiction of Blair County and allowing 30 days for the appointment of new counsel. Counsel was promptly named, but it took Blair County over three months to retransmit the record to the Superior Court. Therefore, it was not until January 12, 1987, 18 months after its filing, that Burkett's appeal was finally denied by the Superior Court.[6]

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6. In affirming the judgment of sentence, the Pennsylvania Superior Court disposed of the appeal by ruling on the merits of only four of seven issues raised. The court did not address two issues for failure by Burkett to raise them in post-trial motions. One issue was whether the trial court had erred by delaying imposition of Burkett's sentence. A third issue was deemed waived for failure to include it in a motion for reconsideration of sentence.

The Superior Court also dismissed Burkett's issue of ineffectiveness of counsel, concluding that no prejudice had been proven as mandated by *Strickland v. Washington*, 466 U.S. 668 (1984).

The Superior Court also concluded that the trial court's grant of continuances to the prosecution under Pa. R. Crim. P. 1100, the sufficiency of the evidence to convict, and the refusal of the trial judge to merge the attempted rape and recklessly endangering charges for the purposes of sentencing, did not constitute reversible error. *Commonwealth v. Burkett*, 364 Pa. Super. 643, 525 A.2d 813 (1987).

The Pennsylvania Supreme Court denied allocatur on December 28, 1987.

When his allocatur petition was eventually denied on December 28, 1987, almost one year after the Superior Court's affirmance of sentence, Burkett returned to the federal system and requested that his constitutional claims, now having been fully exhausted, be reviewed anew.

Shortly thereafter, on January 23, 1988, Burkett filed a new federal habeas corpus petition raising various challenges to his conviction, including claims of counsel's ineffectiveness as raised in his state court appeal, lack of sufficient evidence, and reassertion of his constitutionally-couched delay claims. On December 7, 1988, the magistrate judge issued a Report and Recommendation, suggesting dismissal of Burkett's allegations of ineffective representation by counsel and insufficiency of evidence. The magistrate judge did not address the speedy trial and due process issues, concluding that Burkett's styling of the claim in terms of ineffectiveness of counsel defeated the exhaustion requirement.

In objections filed to the magistrate judge's report, Burkett requested that he be permitted to amend his petition in order to drop the ineffectiveness claim and to reassert the issue as a violation of his constitutional rights, an issue which had been exhausted. The district court adopted the magistrate judge's recommendation and, while not ruling explicitly on the requested amendment, denied Burkett's objections to the magistrate judge's report which included the proposed amendment.

In an unpublished opinion, *Burkett v. Cunningham*, No. 89-3118, (3d Cir. Aug. 7, 1990)

(*Burkett II*), we found error in the district court's labeling of Burkett's constitutional issues as ineffectiveness of counsel claims and determined that the refusal to permit Burkett to amend his petition to exclude the unexhausted claims was not consistent with a sound exercise of discretion. We concluded that the failure to permit the amendment violated the option provided prisoners by *Rose v. Lundy*, 455 U.S. 509, 520 (1982), to resubmit the petition excluding the unexhausted claims. It was thus necessary to remand this matter:

> Inasmuch as the district court did not address Burkett's speedy trial and due process claims, we must remand to the court for appropriate findings as to whether the 29 month delay between the conviction and sentencing violated Burkett's speedy trial or due process guarantees, and whether the two year, five month delay in addressing his state court appeal constituted a violation of due process.

Burkett II, at 7. We then suggested that the district court evaluate the constitutional claims by application of the four part *Barker v. Wingo* test. We also clarified that although we did not comment on the merits of the other issues raised, in the event that Burkett's petition was dismissed by the district court, Burkett would be entitled to present all exhausted claims in a new request for a certificate of probable cause.

On remand, the magistrate judge conducted an evidentiary hearing on the speedy trial and due process issues. In applying the *Barker v. Wingo* factors, the magistrate judge considered the length of the delay, calculating it as 29 months from the

date of conviction to date of sentencing and 18 months from sentencing to decision by the first appellate court of right, the Pennsylvania Superior Court. The magistrate judge further concluded that Burkett satisfied the third factor which evaluates the petitioner's attempts to assert his constitutional rights. As to the second factor, the cause of the delay, the magistrate judge found that Burkett was equally responsible for the time lag – attributable to the number of post-trial petitions and requests for hearings filed by Burkett. Thus, when evaluating the fourth factor of prejudice, the magistrate judge refused to credit any anxiety and distress to Burkett caused by the protracted litigation. The magistrate judge also discounted Burkett's argument that the passage of time resulted in the dimming of witnesses' memories because the prior testimony of the witnesses was a matter of public record.

The magistrate judge thus filed a Report and Recommendation suggesting the denial of habeas relief. The district court adopted the report as its own and entered an order dismissing the writ. On appeal, we granted Burkett's request for a certificate of probable cause.

The district court's legal conclusions that Burkett failed to establish a violation of his constitutional rights to a speedy trial or due process are reviewable *de novo*. *Lesko v. Owens*, 881 F.2d 44 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 759 (1990). The factual findings underpinning these legal conclusions are reviewed for clear error. *Monachelli v. Warden*, 884 F.2d 749 (3d Cir. 1989).

II.

The Sixth Amendment guarantees a criminal defendant a speedy trial. The Due Process Clause of the Fourteenth Amendment dictates that the states effectuate this constitutional guarantee. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

Until our decision in *Burkett I*, the application of the right to a speedy trial to post-conviction proceedings was not clearly established. There we noted that although the Supreme Court in *Pollard v. United States*, 352 U.S. 354 (1957), presumed for purposes of argument "that sentence is part of the trial for purposes of the Sixth Amendment" *id.* at 361, the Court had not yet specifically addressed the issue. *Burkett*, 826 F.2d at 1220. We then reviewed decisions from our sister courts of appeals which discussed the issue after *Pollard*. Some courts chose to label the post-conviction expansion of the right as verified law, *see Tinghitella v. California*, 718 F.2d 308, 312-13 (9th Cir. 1983); *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978), while others assumed the legitimacy of the expansion *arguendo*. *See Perez v. Sullivan*, 793 F.2d 249, 253 (10th Cir. 1986); *United States v. Sherwood*, 435 F.2d 867, 868 (10th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); *United States v. Campisi*, 583 F.2d 692, 694 (3d Cir. 1978). In *Burkett I*, after analyzing the jurisprudence in this area, we dispelled the ambiguity and held conclusively that the Sixth Amendment right to a speedy trial applies from arrest through sentencing. *Burkett I*, 826 F.2d at 1220.[7]

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7. Of note, "no federal court has held that sentencing is *not* within the protective ambit of the Sixth Amendment right to a speedy trial." *Perez v. Sullivan*, 793 F.2d 249, 253.

With respect to the period of time from sentence through direct appeal, in *Burkett I* we were required to confront the argument, for the first time, that the Due Process Clause extends procedural safeguards to defendants in appeals as of right. In reaching our conclusion in *Burkett I* that the protections of the Due Process Clause can apply post-conviction, we relied upon the Supreme Court rationale for broad application of the clause's safeguards:

> By deciding that an appeal is so important that it must be available as a matter of right, a state has "made the appeal the final step in the adjudication of guilt or innocence of the individual." *Id.* at 404, 105 S.Ct. at 840 (citing *Griffin*, 351 U.S. at 18, 76 S.Ct. at 590). The state itself recognizes that an appeal as of right plays such a crucial role that "the State could not . . . decide[] the appeal . . . arbitrar[il]y" or otherwise deny an appellant "fair procedure." *Evitts*, 469 U.S. at 404, 105 S.Ct. at 840.

Id. at 1221.

Having established the possibility that a constitutional deprivation can result from post-conviction delay, we turn to whether Burkett is entitled to habeas relief on these grounds.

III.

A. *The Delay in Imposing Sentence*

We are to assess four factors in determining whether the constraints imposed by speedy trial and due process rights have been honored: (1) length of the delay, (2) reason for the delay, (3) the defendant's assertion of his right, and (4)

prejudice to the defendant. *Barker v. Wingo*, 407 U.S. at 517-38. The district court's factfindings in the context of these factors are subject to the clearly erroneous standard of review. Our review of the court's application of the law to these facts is plenary.

Although the Supreme Court has not precisely articulated a guideline for applying the factors to delays in the post-conviction context, a number of courts of appeals, *see United States v. Reese*, 568 F.2d 1246, 1253 (6th Cir. 1977); *United States v. Campbell*, 531 F.2d 1333 (5th Cir. 1976), *cert. denied*, 434 U.S. 851 (1977); *Perez v. Sullivan*, 793 F.2d at 254, including us, *see United States v. Campisi*, 583 F.2d 692, 694 (3d Cir. 1978), and *Burkett I*, 826 F.2d at 1220, have applied the four-part *Barker v. Wingo* standard of evaluation in such situations.

By way of general guidance, concerning the four-part test, the Court stated that:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533.

With this concept of a "fluid balancing test" in mind, *see Wells v. Petsock*, No. 90-3199, slip op. at 6 (3d Cir. Aug. 16, 1991), we review the facts concerning delay as found by the district court.

1. *Length of the Delay*

The mathematics involved in calculation of the delay in this case are undisputed – 38-1/2 months passed from arrest to sentencing, 29 of these dating from the guilty verdict.[8]

The district court did not render a specific legal conclusion concerning whether the 29-month delay was sufficient to invoke the presumption of a speedy trial violation. Because the court continued in its *Barker v. Wingo* analysis, however, we can presume that it concluded that Burkett satisfied this threshold requirement.[9]

We agree that Burkett did satisfy the first prong, even though the delay he experienced was not as egregious as others reported, *see, e.g., Burkett I*, 826 F.2d at 1210 (five and one-half years from conviction, Burkett not sentenced); *United States*

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8. Burkett argues that the district court erred in computing the delay to be only 29 months, which did not include the additional nine and one-half months from arrest to conviction. Although we agree that this additional time would be significant in the weight to be charged against the government for the length of delay, in fairness to the district court, our remand order explicitly directed the court to evaluate whether "the 29 month delay between conviction and sentencing violated Burkett's speedy trial or due process guarantees . . . ." *Burkett II*, No. 89-3118 at 7.

9. When Burkett's original petition, which included this claim, was heard by the same magistrate judge, the fact that Burkett had not been sentenced on any of the charges for over three and one-half years was sufficient for the court to decide not only that the length of delay presumed a denial of rights, but also that "it would be reasonable to conclude that the delay by Blair County courts has caused some loss to [Burkett]." *Burkett v. Cunningham*, No. 85-769 (W.D. Pa. 1985), Magistrate's Report and Recommendation at 8; App. at 2279.

v. Campbell, 531 F.2d at 1333 (six year delay); *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (prisoner discharged after 31 month delay); *Hooper v. Cunningham*, 1985 W.L. 390 at *3, (Blair County prisoner unsentenced for 37 months discharged from custody). Despite the impossibility of imposing a bright line "how long is too long" standard, *Barker*, 407 U.S. at 421, we are convinced that the delay of 29 months from conviction to sentence invites inquiry into the three remaining *Barker v. Wingo* factors.

2. *Reason for the Delay*

In assessing the number two prong, the cause of the delay, the district court made reference to the congestion of the court calendar in the Blair County Court. While correctly noting that a crowded docket is not afforded substantial weight in considering speedy trial claims, the district court failed to implement the Supreme Court's directive in *Barker* that the ultimate responsibility of delay caused by overcrowded courts rests with the government. 407 U.S. at 531. We emphasized this responsibility in *Burkett I*:

> The reason for the additional delay – crowded court calendars and the court reporter's delay in filing transcripts – must be weighed against the government rather than Burkett.

826 F.2d at 1223.[10]

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10. We note, too, that in the previous *Burkett* district court decision dealing with Burkett's Blair County convictions, *Burkett v. Cunningham*, No. 85-769 (W.D. Pa. 1985), Magistrate's Report and Recommendtion at 6; App. at 2277, the district court weighed the overcrowded court calendar against the government.

In addition to the general maxim that court congestion is the state's responsibility, the record evidence here affirmatively indicates that the failure to schedule a hearing on Burkett's post-trial motions was administrative in nature. At the evidentiary hearing, the Blair County Court Administrator testified that he had no explanation as to why a briefing schedule had not been established according to the procedure normally followed by the Blair County Court or a hearing set on Burkett's post-trial motions.[11] The Court Administrator further testified that during this time he was alphabetically updating criminal defendants' post-trial motions in preparation for implementation of a computer system. Although he represented that he was currently up to the letter "D," he could not explain why "Burkett's motions, beginning with the letter "B", had yet to be scheduled.

Judge Peoples, the trial judge, also testified concerning the status of the court's calendar. In explaining the delay in processing Burkett's post-trial motions, Judge Peoples testified that he could not specifically recollect why Burkett's

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11. Although the dissent would penalize Burkett at this juncture for the 23-month period between the filing of Burkett's post-trial motions and their supporting brief, the timing of the brief's filing was clearly not within Burkett's arena of responsibility. It is the Blair County Court, through its administrative arm, which shoulders the burden of scheduling these matters. *See* Letter Brief of David Gorman, Blair County Assistant District Attorney, dated August 27, 1991, explaining that scheduling of these matters was ordinarily accomplished by letter from the Court Administrator, although no such letter is included in the record of this case.

post-trial motions were delayed, but hypothesized that courtroom demands on his time might be the cause.

As this evidence indicates, the delay caused by the backlog of cases in Blair County cannot be classified as justifiable. While not the type of purposeful activity proscribed in *Pollard*, 352 U.S. at 361, the delay attributable to the congested calendar falls into a non-intentional, but negligent area of administrative overload for which the government must assume responsibility. Thus the district court erred as a matter of law in not assessing the court's crowded dockets against the government.

It is true that Burkett himself added some volume to the dockets in the period between his conviction and sentence. In reviewing Burkett's post-conviction activity, the district court allocated to him a portion of responsibility for the delay:

> Thus it becomes apparent that the great deal of delay in both the trial and the appellate court was occasioned by motions submitted by or on behalf of the petitioner which had to be directed to the court for disposition. These repeated motions added a considerable amount to the delay and disposition by both those courts.

Burkett v. Cunningham, No. 88-1397, Magistrate's Supplemental Report and Recommendation at 10; App. at 1578. Indeed, Burkett vigorously pursued his challenge to the jury's verdicts of guilty by filing a timely motion for a new trial and/or arrest of judgment. Then, 13 months later, on March 12, 1984, at Burkett's request, counsel filed a petition for writ of habeas corpus challenging Burkett's custody on the basis that his speedy trial and due

process rights had been violated because of the delay in disposing of Burkett's post-trial motions and in the imposition of his sentence. After the filing of the petition, beginning on March 28, 1984 Burkett began correspondence with his attorney inquiring as to the status of the habeas petition. When Burkett perceived one response from his attorney as being sarcastic in nature, Burkett determined that his counsel was not taking the appropriate steps in his matters and requested him to withdraw.

In June of 1984 Burkett also initiated communication with Judge Peoples. Burkett complained of his counsel's lack of effectiveness and requested that the court appoint new counsel. Judge Peoples advised Burkett that he would discuss the matter of scheduling a hearing with the Court Administrator. He also suggested that Burkett present his complaints about his attorney to the judge presiding over the habeas hearing. Burkett again wrote to Judge Peoples on July 25, 1984 requesting appointment of new counsel to present Burkett's claims against his trial counsel at the habeas corpus hearing. It was then that counsel advised Burkett that he would likewise request that new counsel be appointed and filed a petition to withdraw as counsel. Judge Brumbaugh conducted a hearing on this motion on August 6, 1984 and denied the motion to withdraw pending disposition of the post-trial motions. Burkett continued correspondence with his attorney, the Court Administrator and the trial judge. Dissatisfied with the responses, Burkett then filed, on September 6, 1984, a *pro se* application for evidentiary hearing by alleging ineffectiveness of

counsel and for appointment of new counsel. Judge Brumbaugh held a hearing on October 11, 1984, at the conclusion of which he indicated that a ruling would be forthcoming on the habeas corpus and bond reduction by the end of the week.

Burkett also requested that his attorney file a petition for a writ of habeas corpus in the federal courts. When counsel failed to do so, Burkett filed a *pro se* petition for writ of mandamus in February of 1985 seeking to compel the court to direct his attorney to file for federal habeas relief.

A hearing was held by Judge Peoples on April 1, 1985, on Burkett's *pro se* motion for new counsel and for an evidentiary hearing concerning ineffectiveness. Burkett was denied appointment of new counsel on April 2, 1985.

Certainly Burkett's aggressive petitioning of the courts required additional paperwork, scheduling of hearings and courtroom time. Yet, by the filing and argument of these motions, which the district court weighed *against* him, Burkett sought merely to compel the Blair County Court to act upon his post-trial motions, or to obtain counsel who would either petition the court to act, to preserve his speedy trial rights, or to secure his appeal rights. It was not unreasonable for Burkett to move for new counsel in view of his perception that his counsel was not receptive to his pleas to have his post-trial motions heard. In addition, we are concerned that a hearing on Burkett's initial state habeas petition was not scheduled for *almost seven months* after its filing. Therefore, rather than the habeas filing demonstrating that *Burkett* contributed to the delay, we view Blair County's delay in handling this serious matter as indicative instead of the general inability of that county's

court to process its criminal dockets in a timely fashion. Accordingly, the cause of the delay here, too, is weighed against the government.

3. *Defendant's Assertion of the Right*

The district court acknowledged that the petitioner urged the speedy disposition of his case. As the chronology stated above amply demonstrates, Burkett's tenacity in pursuing his claims heavily weighs this factor in his favor.

4. *Prejudice*

Unfortunately, the district court did not make any specific findings as to the prejudice which Burkett may have suffered because of the delay. Instead the court reasoned that because Burkett caused some of the delay in the state court's disposition of his case, any prejudice which Burkett may have experienced would not support the granting of relief. Since we have decided that the court's attribution of delay to Burkett was clearly erroneous, we also find that the court's failure to consider the prejudice factor wanting. Clearly, the testimony on behalf of Burkett was orchestrated to demonstrate that Burkett suffered prejudice while awaiting sentencing. We must exercise our power of plenary review to determine if the testimony establishes sufficient qualitative prejudice to weigh this factor in Burkett's favor.

In *Burkett I* we acknowledged that while all four *Barker v. Wingo* factors are to be balanced in light of the facts and circumstances of any case, "the *Barker* prejudice factor did not run fully concurrently when examining delays in sentencing

and delays in initiating appellate review." *Burkett I*, 826 F.2d at 1222.[12]

In *Moore v. Arizona*, 414 U.S. 25 (1973), the Supreme Court stated that the *Barker v. Wingo* factors assume a different (presumably lesser) stature where the defendant is incarcerated after conviction, but explicitly rejected the notion that prejudice is confined to possible impairment of the defense at trial. Instead the Court cautioned that the possible impact impending charges may have on prospects for parole and meaningful rehabilitation should not be overlooked. *Moore*, 414 U.S. at 27.

The Supreme Court has discussed another specific incident which may invoke post-conviction prejudice. In *Strunk v. United States*, 412 U.S. 34 (1972), *quoting Smith v. Hooey*, 393 U.S. 374, 378 (1968), the Court stated:

> [T]he possibility that a defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.

Strunk, 434 U.S. at 437-38.

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12. Although the majority in *Burkett I* duly acknowledged the law concerning adoption of the prejudice factor post-conviction, when applying it to the facts of that case, under a law of the case rationale, it relied upon the district court's finding that the delay alone had caused Burkett prejudice. This approach was strongly criticized in a concurring opinion authored by Judge Garth. Here we do not have a district court finding of prejudice in favor of Burkett, so we need not determine whether such a generalized finding would suffice, under law of the case, to satisfy the prejudice factor.

Relying on *Moore*, *Strunk* and *Smith* in applying the prejudice prong of the *Barker v.Wingo* analysis to post-conviction delays, our sister courts of appeals have identified three traditional interests protected by the speedy trial right: "(1) prevention of oppressive incarceration; (2) minimization of anxiety and concern of the accused; and (3) limitation of the possibility that a defense might be impaired," *Barker*, 407 U.S. at 532, and have adapted them to the relevant timeframe, i.e., awaiting sentence or disposition on appeal. For example, oppressive pre-trial incarceration is not a concern, but instead, focus is directed towards the defendant's time awaiting sentence, the anxiety associated with not knowing the extent of time to be served, and the hindering of a defense on retrial. *See Perez v. Sullivan*, 793 F.2d at 256-57.

The difficulty in establishing prejudice in the post-conviction setting was addressed by the Court of Appeals for the Tenth Circuit in *Perez*. Although acknowledging the Supreme Court holding in *Moore v. Arizona*, 414 U.S. 25, 26 (1973), that demonstrating prejudice is not always a condition precedent to finding a Sixth Amendment violation, the court of appeals opined that, post-conviction:

> [I]t might be said that once a defendant has been convicted it would be the rarest of circumstances in which a right to a speedy trial could be infringed without a showing of prejudice. Moreover, the necessity of showing substantial prejudice would dominate the four part balancing test. This is because of the traditional interest the speedy trial guarantee is designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimizing anxiety and concern of the

> accused; and (3) limiting the possibility that the defense would be impaired . . . . Most of these interests diminish or disappear altogether once there has been a conviction.

793 F.2d at 256.[13] Obviously, as noted in *Perez*, the change in the status from "accused and presumed innocent" to "guilty and awaiting sentence" is a significant alteration which must be taken into account in the balancing process. 792 F.2d at 254. As Judge Garth noted in his concurring opinion in *Burkett I*: "Post-conviction there is less fear that an innocent individual is being improperly subjected to deprivation inherent in incarceration. In effect, post-conviction the individual knows that punishment is imminent, it is uncertain only as to degree." 826 F.2d at 1231 (Garth, J., concurring). Nonetheless, this does not

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13. The issue of whether actual prejudice must be demonstrated to establish a speedy trial claim is presently before the Supreme Court in *Doggett v. United States*, 59 U.S.L.W. 3581 (1991) (order granting *certiorari*). *See United States v. Doggett*, 906 F.2d 573 (11th Cir. 1990) (failure of a defendant to show prejudice precludes speedy trial claim even though other factors were either neutral or weighed against government).

> The questions presented to the Court for review are:
>
> 1) In a speedy trial analysis in which three of the four *Barker* factors weigh in favor of the government, is there a mandatory requirement to demonstrate actual prejudice before a defendant can prevail on an allegation that a speedy trial right has been violated?
>
> 2) Has *Moore v. Arizona*, 414 U.S. 25 (1973), which holds that an affirmative demonstration of prejudice to defense at trial is not required, been reversed?

59 U.S.L.W. at 3486-87.

diminish in any way the balancing test which must be employed in evaluating such claims.

With this standard in mind, we evaluate Burkett's allegations of prejudice, beginning with his claim of exposure to oppressive pre-sentence incarceration. First, Burkett complained that because he could not secure the onerous $100,000 bond set, he was denied the opportunity to demonstrate good behavior while released. We find that this allegation is too speculative for consideration.

Secondly, Burkett argued that the trial court's failure to sentence him impeded his ability to apply for commutation of sentence, governor's pardon, or reconsideration, since no commutation can be considered until all appeals have been exhausted. Though uncontradicted, these are not the type of losses of the quality sufficiently substantial to justify relief from custody.

Third, Burkett contends that, in computing his sentence, Judge Peoples considered a subsequent arrest for perjury detailed in Burkett's presentence report. This averment, if proven, would suffice to show prejudice. *See Juarez-Casares v. United States*, 496 F.2d 190, 193 (5th Cir. 1973) (prejudice demonstrated by sentencing court's considering subsequent conviction). It is impossible, however, to probe the truth of Burkett's accusation in this regard. Judge Peoples testified that he could not remember specifically whether or not the perjury charge was included in the pre-sentence report, but he stated that he would not consider an arrest, without a conviction, when imposing sentence. Therefore, without any direct evidence which counters Judge Peoples'

testimony, we cannot credit Burkett's contention that his subsequent arrest impacted the sentence received.

Burkett next contends that he was unable to avail himself of institutional programs, critical to his rehabilitation, available through the state but not the county penal system, namely, alcohol and sex offender programs in which he was eventually able to participate when incarcerated in the state prison. Calculating from the date of his arrest, the three and one-half years of incarceration in the county system was characterized by Burkett as "dead time." Burkett also referred to the loss of time in which he could have been afforded visiting privileges outside the walls of the prison. Such visitation rights are available through the state system to a particular classification of inmates.

We do find merit in Burkett's detailing of prejudice here. Although it is not the norm for a prisoner to advocate the advantages of the state penal system before us, we are willing to credit Burkett's assertions that access to rehabilitative programs and the opportunity for more liberal visitation privileges are an appealing and legitimately valid alternative to the limbo he experienced in the county system.

As to his concern that the certainty of a sentence imposed would minimize anxiety and distress, Burkett detailed his inability to eat and sleep and how, on occasion, he was reduced to tears by frustration caused by the delay in disposition of his post-trial motions and sentencing. He mentioned the loss of his fiancee who, he claimed, ended their relationship because of the uncertainty of the length of his incarceration.

Whether this imprisonment angst rises above the level of anxiety indigenous to any term of incarceration is difficult to discern. In some instances the distress associated with delay in criminal proceedings has been medically verified. In *United States v. Dreyer*, 533 F.2d 112 (3d Cir. 1976), a defendant experienced a 29 month delay between indictment and trial. During this time she experienced a severe mental disturbance which, despite psychiatric treatment, culminated in a suicide attempt. In *Dreyer*, we found that the anxiety equated to sufficient prejudice to satisfy the fourth *Barker v. Wingo* factor.

In a later and less factually dramatic case, *Government of the Virgin Islands v. Pemberton*, 813 F.2d 626 (3d Cir. 1987), we acknowledged that under *Moore v. Arizona*, 414 U.S. at 27, *quoting Barker*, 408 U.S. at 537 (White, J., concurring), the fact that there has been disruption to a defendant's employment, his financial resources affected and the general strain and anxiety put upon family and friends constituted prejudice which must be considered in ascertaining whether there has been a speedy trial violation. We balanced this, on the other hand, with the recognition that a certain amount of anxiety in the form of personal prejudice to the accused is inevitable in a criminal case. *Pemberton*, 813 F.2d at 629. Relying upon our decision in *Government of the Virgin Islands v. Burmingham*, 788 F.2d 933, 937 (3d Cir. 1986), that an 18 month delay between indictment and sentencing did not, under *Barker*, require us to grant relief, we denied Pemberton's constitutional claim for failure to produce evidence of a specific psychological

disorder resulting from the anxiety of incarceration. *Pemberton*, 813 F.2d at 629-30.

We recognize a marked difference in the *Pemberton* case and the one before us today. Although we compared the psychological distress in *Pemberton* unfavorably to the type of specific disorder which satisfied the prejudice factor in *Dreyer*, we faulted Pemberton because, despite his allegations of acute anxiety, he made no inquiry of the government or of the court as to the status of his criminal proceedings. We certainly cannot penalize Burkett, as we did the petitioner in *Pemberton*, for a lack of interest in inquiring as to the status of his case.

Likewise we recognize that Burkett's anxiety does not rise to the level of mental disorder detailed in *Dreyer*, but it is uncontested that Burkett suffered lack of sleep, loss of appetite, loss of companionship and emotional stress associated with his inability to determine the length of his incarceration. This uncontested evidence gives credence to Burkett's contention that the delay between conviction and sentencing caused him to suffer emotional distress, complete with physical manifestations. Although we hesitate to conclude that this evidence of anxiety in and of itself would support relief under *Barker* and its progeny, it does function to tip the scale slightly in Burkett's favor in evaluating his speedy trial claim.

Finally, regarding the possibility of an impaired defense on retrial, Burkett contends that the passage of time would make it more difficult for him to refresh the memory of witnesses or to elaborate upon exculpatory evidence in the event of a retrial. Certainly the possibility of the dulling of memories works against the government as well.

As stated by the Supreme Court in *United States v. Loud Hawk*, 474 U.S. 302, 315 (1985):

> [D]elay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry out this burden.

Id. at 315. This is not critical here because in *Moore v. Arizona*, 414 U.S. at 26-27, the Court explicitly rejected a reading of *Barker* to confine prejudice to impairment of the defense and, instead, recognized that an accused is also "disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion and often hostility," 407 U.S. at 533.

Although Burkett's status changed from "accused" to "convicted," and his allegations of prejudice chiefly concern delays subsequent to conviction, we conclude that the speedy trial guarantee shield against personal prejudice, *see Strunk v. United States*, 412 U.S. at 439, has been significantly damaged by the delay between Burkett's conviction and sentence. Nonetheless, we do not rest our decision to grant the writ solely on the demonstration of prejudice to this point. It is not until we detail the subsequent delay, between sentencing and appeal disposition, and evaluate its cumulative impact, that we conclude that Burkett has suffered the deprivation of a constitutional right.

B. *The Delay in Resolving the Direct Appeal*

1. *Length of the Delay*

As with the sentencing computation, there is no dispute that the passage of time from notice of appeal to affirmance of judgment by the Pennsylvania Superior Court was 18 months.

2. *Reason for the Delay*

Once again, the district court erroneously attributed a portion of the cause for delay to Burkett. The procedural history begins with the notice of appeal filed by Burkett on July 23, 1985. Burkett's brief was filed on February 10, 1986. After Burkett filed a disciplinary action against his counsel, a motion to withdraw was granted on April 4, 1986, and new counsel was appointed on April 9, 1986.

Despite the passage of all of this time, the trial court's opinion denying the post-trial motions was not filed until July 16, 1986 — *one full year* after the notice of appeal. As an explanation, Judge Peoples stated that he was not authorized to employ a law clerk until 1984. He also testified that in the years 1983 through 1986 he and his fellow judges were constantly in the courtroom and necessarily compelled to confine their opinion-writing time to nights and weekends. The Court Administrator, however, contradicted this testimony. According to his recollection, in 1985 he scheduled one week per month per judge for opinion-writing time. Also, by the Court Administrator's records, Judge Peoples was not in the courtroom as represented. In fact, neither trials nor court hearings were scheduled in July and August when the Blair County Courthouse was closed.

After the opinion was filed, Burkett filed a supplemental brief on August 26, 1986. Burkett

then moved for appointment of new counsel, which was denied on September 23, 1986. After the appellee's brief was filed, Burkett filed another motion for new counsel which was denied December 15, 1986. Finally, the judgment of sentence was affirmed by the Superior Court on January 12, 1987.

We glean from this history that while Burkett's troubles with his attorneys may have added a month or two to the appellate process, the delay in the appeal was directly caused by the trial judge's failure to file an opinion, in derogation of the Pennsylvania Rules of Appellate Procedure, for one year. Thus, the district court's attribution of delay to Burkett was incorrect and the cause for delay must be charged, instead, against the government.

3. *Defendant's Assertion of the Right*

There is no contention that Burkett did not doggedly pursue his appellate claims. Thus this factor will weigh in his favor.

4. *Prejudice*

Our analysis of those elements which constitute prejudice caused by delay in the appellate process is not distinguishable from our discussion in the context of sentencing. The identical factors of oppressive incarceration, anxiety and distress, and possible impact on the defense at retrial are considered. We add here the additional facts attested to by Burkett concerning the prejudice suffered: the continued inability to participate in rehabilitative programs, the anxiety of not knowing when his appeal would be decided and the further passage of time affecting his ability to reconstruct

his defense. It is not, however, a qualitative difference but the increased *quantity* of prejudice which concerns us. In our analysis of the delay in sentencing, we held that the constitutional protection of the Sixth Amendment had been impacted. We conclude now that that injury has been intensified by the appellate delay in violation of the Due Process Clause. Although one phase of the delay – from conviction through sentencing – invoked Sixth Amendment protection and the later appellate stage involves due process considerations, it makes little substantive difference. The label we attach to the constitutional deprivation – though important – is not as critical as the establishment that indeed such rights have been violated.

Burkett's loss incurred due to the post-conviction delay did not take a different form just because the two phases of the delay were protected by different constitutional guarantees. Although our legal authority for granting relief due to a loss of these rights is dictated by the clause which establishes the right, in our prior cases analyzing the prejudice factor, we do not discern a difference whether we discuss speedy trial or due process. Under either constitutional amendment, we analyze whether, after conducting the sensitive balancing test under *Barker v. Wingo*, the scales tip in favor of the petitioner or of the government.

Here, the length and cause for the delay weigh decidedly against the government and in favor of Burkett. Burkett's assertion of his right strongly tips the scale to Burkett's favor. Finally, as to the prejudice factor, while Burkett's evidence is less than overwhelming in this regard, we are satisfied that he has demonstrated genuine loss –

cumulative in nature – because of the delays in the post-conviction processing of his case at the trial court level and through the appellate process. Particularly in light of the heavy weighing of the other three factors against the government, we conclude that Burkett is entitled to habeas relief under the *Barker v. Wingo* test.

V.

We turn now to the question of relief. Because his constitutional rights have been violated, Burkett asks us to grant his writ and release him forthwith. We must determine if this drastic remedy is appropriate or whether we should attempt to fashion alternate relief.

Our right to "craft" a remedy is granted as a statutory matter. Under 28 U.S.C. § 2241(a) (1948), a "[w]rit of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge . . . ." Under 28 U.S.C. § 2243, "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." Thus the fashioning of relief is not confined to the district court.

Caselaw precedents, too, support our authority to construct an appropriate remedy. In *Strunk v. United States*, 412 U.S. at 437-38, the Court reviewed a habeas remedy molded by the Court of Appeals for the Seventh Circuit to compensate for a Sixth Amendment delay. The Court took issue with the Court of Appeals' decision to credit the defendant with the time elapsed between the return of the indictment and the date of arraignment because it did not compensate for the particular prejudice suffered. The Court of Appeals'

power to fashion the remedy, however, was not disputed.

A later opinion by the Supreme Court reinforces our authority to grant relief. In *Hilton v. Braunskill*, 481 U.S. 770 (1985), the Court concluded:

> We think it would make little sense if this broad discretion allowed in fashioning the judgment granting relief to a habeas petitioner were to evaporate suddenly when either the district court *or the court of appeals* turns to consideration of whether the judgment granting habeas relief should be stayed pending appeal.

Id. at 775 (emphasis added).[14]

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14. The designing of relief by the courts of appeals has been criticized when there is no factfinding on prejudice by the district court. Indeed, the prior release of Burkett caused Judge Garth to express his displeasure in *Burkett I*:

> The majority appears to believe that when faced with a substantial delay in an individual's speedy trial rights, it is appropriate for this court to address unresolved factual issues concerning both prejudice and the proper remedy for any prejudice that is found. In my view, by so holding in this case, the majority has usurped the district court's traditional role of fact-finder. *See United States v. Campbell*, 531 F.2d 1333, 1336 (5th Cir. 1976), *cert. denied*, 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 121 (1977) (where no explicit finding of prejudice has been made, remand to district court is appropriate). Similarly, once prejudice has been found, it is the district court which should decide what remedial action is required.

826 F.2d at 1223 (Garth, J., concurring).

We note that our willingness to fashion relief here is not to be construed as an unwarranted intrusion into the customary domain of the district court, but is motivated instead by the chronic delay already experienced by Burkett.

Balancing the authority granted by statute and as interpreted by caselaw to dispose of the writ in a just manner, against the general prohibition to act as a factfinder, we evaluate Burkett's claim in order to fashion relief designed to rectify the prejudice of the violation. *Burkett I*, 826 F.2d at 1220, *citing Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 486 (1973).

In *Burkett I*, we held that no relief short of discharge could fully remedy violation of Burkett's right to a speedy trial and due process where Burkett still had not been sentenced five years after conviction. 826 F.2d at 1226. In *Burkett I*, however, the state court continued to violate the federal court order that petitioner be sentenced, and, also, the state's attorney conceded that discharge was the appropriate remedy.

Here, the relief is more difficult to fashion. Because the district court did not engage in explicit factfinding on the issue of prejudice, we were required to exercise our de novo review powers over the testimony presented. Our activity in this regard is not to be construed as a broadening of our review authority over matters of fact as here, we were not compelled to find facts, per se; rather, we determined that the *uncontradicted* facts legally demonstrated prejudice sufficient to justify granting of the writ. We concluded that the bulk of prejudice occurred here because the "benefits" of incarceration in a state institution were denied to Burkett and because Burkett was able to detail anxiety related to the

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We are compelled, therefore, to choose the most expedient avenue available to correct the constitutional injury suffered by the petitioner.

processing of his case post-conviction. We recognize that the Court of Appeals for the Tenth Circuit held that in the context of post-conviction delay, these considerations do not warrant discharge as a matter of law, *see Perez*, 793 F.2d at 257 (anxiety of accused not equated for constitutional purposes with anxiety suffered by one convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long sentence will be). We are thus challenged to fashion relief in such a way as to compensate Burkett for the particular harm he has suffered.

We have characterized the prejudice suffered by Burkett as that amount of time spent in various county prisons, from conviction to sentencing, without access to rehabilitative and support systems provided by the state court system, the anxiety ensuing from the uncertainty surrounding the delayed disposition of his case and Burkett's inability for effective contact with his family and friends. Thus we conclude that an appropriate remedy here is to reduce Burkett's sentence by the amount of time he spent in various county facilities after conviction and before sentencing, sentencing constituting that point at which the state normally assumes custody of a convicted felon. We calculate this time generally as 29 months.

In addition, Burkett must be credited with the ten-month period of delay in the processing of his direct appeal caused by the trial court's untimely opinion in support of its denial of Burkett's post-trial motions. We will not credit Burkett for the entire period during which his appeal was pending, as the record supports that his case was handled efficiently by the Pennsylvania Superior

Court. We are acutely aware of the imprecision inherent in this relief, but we realize that compensating for a constitutional deprivation is not an exact science. We are convinced that effectuation of this remedy will rectify the prejudice suffered.

VI.

In the petition originally filed in this matter, Burkett raised a number of issues separate from his speedy trial and due process claims. When we, in *Burkett II*, remanded the matter to the district court, in an amendment to our opinion we permitted Burkett to raise these additional issues if dissatisfied with the disposition in the district court.

Presently, Burkett has identified three allegations of error which he requests us to review. First, Burkett asserts that his counsel was ineffective for failing to file a motion to suppress suggestive identification evidence. Burkett had argued that the victim's identification of him at the preliminary hearing was tainted because outside of his defense counsel's presence, a police officer escorted the victim over to Burkett, who was handcuffed, and asked her if Burkett was the perpetrator. Burkett's primary complaint is that because there was no hearing on this alleged out-of-court suggestive confrontation between the victim and himself, the district court did not have sufficient facts to evaluate this claim.

A pretrial identification procedure violates due process, and requires exclusion of the testimony based on that procedure, if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons v. United*

States, 390 U.S. 377, 384 (1968). The general inquiry is whether the procedure was unnecessarily suggestive, and if so, whether its corrupting influence outweighs the reliability of the identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *see also Neil v. Biggers*, 409 U.S. 188 (1972) (factors for determining reliability of identification testimony). Here the victim had a face-to-face confrontation with the perpetrator in her house lasting approximately one-half hour.[15] This independent basis for the victim's identification of Burkett is of such sufficient strength that any corrupting influence from the preliminary hearing episode cannot be said to outweigh the reliability of her identification testimony under the *Manson* standard.

Burkett also contends that counsel was ineffective for failure to file a motion to suppress identification testimony based upon the victim's viewing of a photographic display. Specifically, Burkett argues that the display was highly suggestive because it simply consisted of two photographs of Burkett, and no photographs of anyone else. Nonetheless, even assuming *arguendo*

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15. These findings emanate from the opinions of the Court of Common Pleas on post-verdict motions and the Superior Court's affirmance of the judgment of sentence (finding that the victim had a prolonged encounter with the perpetrator in a well-lit house). State court findings of fact are subject to a presumption of correctness under 28 U.S.C. § 2254(d). *Sullivan v. Cuyler*, 723 F.2d 1077, 1084 (3d Cir. 1983). To the extent that Burkett contests the lack of an evidentiary hearing, he has not established that the state factfinding was faulty, that the findings are not fairly supported by the record or that any other exceptions to the presumption of correctness apply. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963).

that the photograph identification procedure employed was unnecessarily suggestive, the tainted influence could not have been so great as to outweigh the victim's identification testimony resulting from her observation of the perpetrator at close range for a prolonged period of time during the commission of the crime.

It is true that no evidentiary hearing occurred before the district court, however, the court had available the trial transcript in rendering its conclusion and we find no error in its decision on this issue.

Burkett next argues that there was insufficient evidence to prove beyond a reasonable doubt that he entered the victim's dwelling with the specific intent to commit rape, thus rendering this conviction unsupported by the evidence. Here, the district court correctly concluded from the fact that the perpetrator described sexual acts which the victim was to perform, wielded a knife, and unzipped his pants, that a reasonable jury could infer that he intended to commit a rape.

Finally, Burkett raises a completely unmeritorious claim that there was inadequate evidence to convict him of recklessly endangering another person. The district court properly noted that the jury heard testimony that Burkett brandished a knife and threatened to slit the throat of the victim and that this evidence was sufficient to justify conviction on this offense.

VII.

For the reasons stated above, we will reverse the order of the district court and will remand the matter to the district court to grant the writ by

reducing Burkett's sentence by the 39 months of delay chargeable to the Blair County Court.

ALITO, *Circuit Judge*, dissenting.

1. This habeas corpus appeal is the latest chapter in a long story. In 1981 and 1982, the petitioner, Wayne Paul Burkett, was charged in the Court of Common Pleas of Blair County, Pennsylvania, with three separate sets of serious criminal offenses. First, in February 1981, Burkett was charged with two rapes, two burglaries, and numerous other crimes. In November 1981, a jury found him guilty of some of the charges, including both burglaries. *Burkett v. Cunningham*, 826 F.2d 1208, 1211 & nn. 1, 3-5 (3d Cir. 1987 (3d Cir. 1987 ("*Burkett I*"). Burkett was never sentenced for those offenses, however, and therefore in *Burkett I* this court ordered his release. *Id.* at 1214, 1226.

Six days after Burkett's first arrest in February 1981, he was arrested again and charged with a second set of offenses, including rape and aggravated assault. In January 1982, he was found guilty on all counts. 826 F.2d at 1211 & n.2. He was not sentenced, however, until after he had filed a federal habeas petition and the district court had entered an order that, in effect, granted the writ unless Burkett was sentenced within a specified period. *Id.* at 1213 & n.10. In July 1985, Burkett was sentenced as an habitual offender to imprisonment for 22 to 44 years (*id.* at 1213), but as a result of delay in disposing of his direct appeal, this court in *Burkett I* remanded for factfinding (*id.* at 1227) that eventually resulted in his discharge pursuant to another federal writ. Maj. typescript at 9 n.5.

In April 1982, while on bail pending sentencing for the second set of charges, Burkett was arrested a third time and charged with attempted rape, burglary, and other crimes. 826 F.2d at 1211-12 & n.6. He was convicted in January 1983 and sentenced in June 1985 to imprisonment for 16 to 32 years. *Id.* at 1213. The present appeal concerns this third set of charges.

2. Some of the delays in Burkett's cases were aptly termed "monumental" in *Burkett I*, 826 F.2d at 1210, and consequently Burkett's convictions for numerous serious crimes have already been overturned. Our task in this appeal is to determine whether Burkett's constitutional rights were violated by delay in imposing sentence and disposing of his direct appeal relating to the third set of charges. Applying the factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972), the majority concludes that a constitutional violation occurred. I respectfully disagree.

Turning first to the length of delay, I concur fully with the majority's conclusion that the gap between verdict and sentencing (29 months) was highly excessive. On the other hand, I do not think that the time from notice of appeal to affirmance by the Superior Court (18 months) may be similarly characterized.

The district court found that Burkett and the Commonwealth shared responsibility for causing the delays, and unlike the majority, I agree with this conclusion. There is no suggestion that the prosecution deliberately caused delay to hamper the defense. See *Barker*, 407 U.S. at 531. In addition, there is no doubt that Burkett's various applications, a good many of which do not concern complaints about delay, also prolonged the

disposition of his case. To take the most striking example, within days after the guilty verdicts, Burkett's attorney filed a one-page "Motion in Arrest of Judgment and/or For New Trial." Among other things, this motion asserted without any elaboration that "[t]he verdict was against the weight of the evidence" and "against the law." Without a supporting brief, the trial court could not have possibly decided this motion on the merits, but the defense did not file such a brief until *23 months later*. In light of this extraordinary lag, the defense surely must share responsibility for the delay. While the trial judge could have prevented defense counsel's conduct from delaying sentencing by issuing a briefing deadline and dismissing the motion in the event of noncompliance, the trial judge's inaction does not completely exonerate the defense.

My major disagreement with the majority concerns the question of prejudice, which is "the polestar of any post-conviction speedy trial analysis." *Burkett I*, 826 F.2d at 1232 (Garth, J., dissenting). The majority finds that the delay caused prejudice for three reasons: (1) Burkett was incarcerated in the county jail rather than in state prison, where he claims he would have enjoyed access to rehabilitation programs and visitation rights; (2) he suffered anxiety and distress caused by uncertainty about the length of the sentence that would imposed and the disposition of his appeal; and (3) the delay might have had an impact on his defense at a retrial. In my view none of these reasons is entitled to much if any weight here.

I would not hold on the present record that Burkett was prejudiced because he was

incarcerated in the county jail rather than a state prison. *See Perez v. Sullivan*, 793 F.2d 249, 257 (10th Cir. 1986), *cert. denied*, 479 U.S. 936 (1986). If the relative conditions at the jail and prison are important for present purposes, then a careful evaluation based on reliable evidence is necessary. The majority, instead, relies solely on Burkett's testimony that he preferred the prison. There is no objective evidence comparing the jail and prison; nor did the district court make any findings regarding the comparative desirability of the two institutic ɔ. I certainly would not find on appeal that one institution is more desirable than another based solely on a transcript of the testimony of a witness who testified knowing that several decades of incarceration were potentially at stake. More fundamentally, I would hold that differences between penal institutions can rarely, if ever, provide a basis for finding prejudice under *Barker*. Otherwise, the federal courts will have to start to compile comparative rankings of jails and prisons, an enterprise that does not have much to do with the constitutional right to a speedy trial, sentence, or appeal.

Nor would I conclude that Burkett was significantly prejudiced by anxiety and distress caused by uncertainty about the length of the sentence that would be imposed or the outcome of his direct appeal. Again, the majority relies solely on Burkett's own testimony, and even this testimony does not show the kind of unusual mental suffering that our prior cases have demanded before placing much weight on this factor. *See Government of the Virgin Islands v. Pemberton*, 813 F.2d 626, 630 (3d Cir. 1987); *United States v. Dreyer*, 533 F.2d 112, 116-17 (3d

Cir. 1976). *See also Perez*, 793 F.2d at 257. ("the anxiety of an accused [awaiting trial] is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be"). If we are willing to find significant prejudice merely because a defendant states that he or she suffered from anxiety and distress, we might as well deem prejudice to exist in every case involving delay.

Finally, I am puzzled by the majority's reliance on the possible impact of the sentencing delay on Burkett's defense at a retrial. Since no court has held that Burkett is entitled to a new trial, it makes no difference whether delay would have any effect if he were retried.

Taking all of the facts together and placing particular weight on the lack of demonstrable prejudice, I would not hold that a constitutional violation occurred. In reaching this conclusion, I emphatically do not approve or condone the type of delays that occurred throughout this case.

Having found a constitutional violation, the majority grapples with the question of remedy, recognizing, I believe, the anomaly presented by Burkett's request to be discharged because of delay that has apparently had no impact whatsoever on the sentence imposed, the amount of time he will spend in custody, or the disposition of his appeal. The majority's answer is to reduce Burkett's sentence. The problems with this approach are self-evident. The Second Circuit's alternative solution deserves consideration. Under that approach, state prisoners experiencing post-verdict delay are excused from compliance with exhaustion requirements after a shorter

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period of time than might otherwise be required, their habeas petitions are expedited, and conditional writs are granted requiring disposition of post-verdict proceedings within a specified period. *See Cody v. Henderson*, 936 F.2d 715 (2d Cir. 1991); *Diaz v. Henderson*, 902 F.2d 652 (2d Cir. 1990); *Simmons v. Reynolds*, 898 F.2d 865 (2d Cir. 1990). Where a state prisoner does not seek such a conditional writ, however, habeas relief is granted only if delay unconstitutionally tainted the outcome of the post-verdict proceedings. *Id.*

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 17th day of April, 1992, to the following:

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DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the within document was mailed, postage and fees paid (USC-426), at the United States Post Office in Pittsburgh, Pennsylvania, at its branch on Seventh Avenue and Grant Street, on the 17th day of April, 1992.

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